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CLERK SUPREME COURT

**FILED**  
MAY 15 2000  
NOEL K. DESSAINT  
CLERK SUPREME COURT  
BY *ky*

R-00-0004

No. \_\_\_\_\_

AMENDED PETITION FOR  
ADOPTION OF RESTATEMENT  
OF ARIZONA RULES OF PROCEDURE  
FOR THE JUVENILE COURT

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## **I. INTRODUCTION.**

On March 2, 2000, the Committee on Juvenile Courts, through its chair, the Honorable William O'Neil, submitted a proposed restatement of the Arizona Rules of Procedure for the Juvenile Courts. The proposed rules, R-00-0004, were distributed for public comment on or about March 16, 2000. The original petition is now being supplemented, as outlined in Appendix A, to address two areas of statewide significance, Victims' Rights and the Indian Child Welfare Act.

In 1996, 1997 and 1998 sweeping and comprehensive statutory changes were enacted which dramatically impacted Title 8, of the Arizona Revised Statutes in the areas of dependency and delinquency. Those statutory changes have come to be known as the "Stop Juvenile Crime Initiative" or "Proposition 102" governing delinquency proceedings and "Model Court" legislation, governing dependency, termination and guardianship proceedings. In response to those statutory changes, two small groups were appointed by the Committee on Juvenile Courts, through its chair, the Honorable William O'Neil, Presiding Juvenile Court Judge of Pinal County, for purposes of amending the Rules of Procedure for the Juvenile Court. Those rules were enacted on an emergency basis in 1997 and 1998, with the intention of convening a larger, more representative group to draft comprehensive revisions to the rules.

In early 1999, letters were sent statewide to all key entities involved in juvenile practice, requesting participation on a committee being formed under the direction of Judge O'Neil for purposes of revising the rules governing delinquency and dependency proceedings. It was determined at this time that rules of procedure governing adoption proceedings should be developed given the passage of the Adoptions and Safe Families Act, P.L.105-89, and the

emphasis placed on adoptions. The committee formed included representatives from the judiciary, juvenile court directors, clerks of the court, county attorneys, public defenders, legal defenders, attorneys general and private practitioners from around the state. The committee formed three separate workgroups, each one focused on a particular area of practice. The workgroups reviewed rules from other states and met twice per month during 1999 and into 2000 in order to develop the proposed rules. The Delinquency Workgroup was chaired by the Honorable Maurice Portley, Presiding Juvenile Court Judge of Maricopa County; the Dependency Workgroup was chaired by MaryLou Hanley, Director of the Children's Services Division of the Arizona Supreme Court; and the Adoptions Workgroup was chaired by Brooks Hozier, Esq., a private practitioner with an extensive adoptions practice. All three workgroups were assisted by Christine Powell, Esq., who was charged with oversight of the project and development of a comprehensive and uniform set of rules.

The workgroups focused on the creation of a comprehensive set of rules which were user friendly and reflective of best practices within the juvenile courts. The rules have been renumbered and reorganized in such a way as to constitute a complete restatement of the existing rules. The proposed rules attempt to define what should occur at each stage of a proceeding, including the applicable burdens of proof and findings the court should make. The committee determined that provisions of the civil and criminal rules of procedure should be incorporated, as may be applicable and reflective of current practice, but that the juvenile rules should be "stand alone" in nature. This represents an attempt to clarify the application of other rules of procedure in juvenile proceedings, an area which has created much confusion for practitioners in the past.

The proposed rules attempt to avoid specific statutory references in order to prevent the need for constant revision of the rules each time statutes are renumbered. Finally, the proposed rules attempt to clarify statutory provisions and codify existing case law within the rules.

The original petition has been amended, as reflected herein, in order to highlight two areas of statewide significance, Victims' Rights and the Indian Child Welfare Act. Statutory provisions relating to the rights of victims in juvenile proceedings have been incorporated within the proposed delinquency rules in order to ensure the protection of those rights. Major provisions of the Indian Child Welfare Act have been incorporated into the proposed dependency and adoption rules in order to ensure compliance with federal mandates. The application of the Indian Child Welfare Act within the rules of procedure was the subject of great debate within the dependency workgroup. The Court is seeking comment on both the original and the amended petitions. All proposed language not appearing in the original petition appears in bold text.

The Petitioner strongly recommends adoption of either version of the proposed Rules of Procedure for the Juvenile Court at the earliest possible opportunity in light of the difficulties being experienced by juvenile courts as they attempt to implement sweeping legislative changes without the benefit of clear, comprehensive rules of procedure. The Committee on Juvenile Courts has reviewed both petitions and fully supports a comprehensive revision of existing rules. The proposed rules would provide consistency and uniformity to juvenile proceedings statewide and reflect current practice in many counties. Further, the rules are reflective of the Court's mission to become more accessible and user friendly.

## **II. SUMMARY OF PROPOSED AMENDMENTS**

### **PART I GENERAL PROVISIONS.**

#### **RPJC 1. Applicability, Definitions.**

RPJC 1 restates most of the language currently found in RPJC 1 (A)&(B). Former subsection (C), which defines the parties, now appears in RPJC 9(A), RPJC 37(A) and RPJC 68(A)(1).

Language in former subsection (D) is found in RPJC 9(B).

#### **RPJC 2. Change of Judge.**

RPJC 2 reorganizes language found in RPJC 20.1.

#### **RPJC 3. Appointment of Special Advocate.**

RPJC 3 restates language found in RPJC 22.1 and authorizes the appointment of a special advocate in guardianship and termination proceedings. The term “neglect” is omitted as neglect is incorporated within dependency proceedings.

#### **RPJC 4. Electronic Filing.**

RPJC 4 authorizes the filing of any pleading transmitted electronically. The pleading is deemed filed as of the time of electronic receipt by the clerk of the court. The original pleading must be filed with the court within forty-eight hours of electronic transfer, excluding Saturdays, Sundays and holidays. RPJC 4 reflects current practice in many courts statewide and was determined to be necessary given existing time limits within which to file petitions both in delinquency and dependency matters.

#### **RPJC 5. Local Rules.**

RPJC 5 restates language found in RPJC 23.

## **RPJC 6. Formality of Proceedings.**

RPJC restates language found in RPJC 7(a) and RPJC 16.1(b).

## **RPJC 7. Priorities.**

RPJC 7 gives juvenile proceedings priority over all state court proceedings. Due to statutorily mandated time limits in delinquency, dependency, guardianship and termination proceedings, it was the opinion of the committee that there is no need to address priorities among the various proceedings in rule. Therefore, language contained currently in RPJC 6.1(A)(1) and RPJC 18.1(a) has been omitted from the proposed rules.

## **RPJC 8. Applicability of the Indian Child Welfare Act.**

This rule was created in order to highlight the importance and applicability of the Act in state court proceedings involving non-criminal child custody proceedings. **While the original petition filed referenced the Act, the amended petition seeks to provide additional guidance by integrating some key provisions within the rules. Specifically, the rules set forth the placement preferences and the applicable burdens of proof. The issue of when the findings required by the Act must be made is not clear. The Act refers to the findings in relation to the initial removal of the Indian child and any adjudicatory proceeding. Some states require that the findings be made at each proceeding in order to ensure the Indian child is returned as soon as the court finds return would not be likely to result in serious emotional or physical damage to the child. These rules require that the findings be made at the time of the initial removal and at any adjudication proceeding.**

## **PART II DELINQUENCY AND INCORRIGIBILITY PROCEEDINGS.**

### **RPJC 9. Definitions.**

RPJC 9 restates language found in RPJC 1(C), with the addition of the victim and the state as identified parties.

### **RPJC 10. Appointment of Counsel and Waiver.**

RPJC 10(A) authorizes the appointment of counsel for parties determined to be indigent, including the juvenile. RPJC 10(B) outlines the determination of indigence and is based upon Rule 6.4, Ariz. R. Crim. P. RPJC 10(C) restates language found in Rule 6.5(a), Ariz. R. Crim. P. RPJC 10(D) substantially restates language currently found in RPJC 6(C) but omits language requiring that a written waiver of counsel be obtained from the juvenile's parent or guardian on behalf of them and the child. The committee determined that such language was unnecessarily confusing as the parent or guardian is not entitled to counsel and, therefore, need not formally waive counsel.

### **RPJC 11. Appearance of Counsel.**

RPJC 11(A) restates most of the language found in RPJC 21. RPJC 11(B) seeks to clarify when counsel may withdraw from representation and omits reference to Rule 80(e), Ariz. R. Civ. P. as that rule has been abrogated.

### **RPJC 12. Attendance of Juvenile at Proceedings.**

RPJC 12 governs the appearance of the juvenile at proceedings. RPJC 12(A) departs from language currently found in RPJC 7(b) which permits the juvenile to voluntarily absent him or herself from all but transfer proceedings. The committee determined that the presence of the

juvenile was critical for those proceedings as outlined in proposed RPJC 12(A). RPJC 12(B) permits the juvenile to appear telephonically or through video conferencing if authorized by the court, which would constitute a personal appearance. This rule is necessary to address those circumstances where the juvenile is detained in another county at the time of hearing and cannot be transported in a timely manner. RPJC 12(C) restates language found in RPJC 7(b). RPJC 12(D) permits the court to proceed in the juvenile's absence or issue a warrant for the juvenile's arrest.

### **RPJC 13. Attendance of Witnesses.**

RPJC 13(A) requires that all witnesses and parties personally appear for adjudication proceedings unless authorized by the court. RPJC 13(B) permits video conferencing or telephonic appearances and testimony in non-adjudicatory proceedings and was drafted in response to the court's opinion in Maricopa County Juvenile Action No. JV131701, 183 Ariz. 481, 904 P.2d 1305 (App. 1995). Permitting telephonic appearances and testimony in non-adjudicatory proceedings will assist the court in efficiently processing cases without impacting the due process rights of the juvenile.

### **RPJC 14. Consolidation of Hearings.**

RPJC 14 restates language found in RPJC 7(a).

### **RPJC 15. Motions.**

RPJC 15(A)&(B) set forth procedures for filing motions. The rule does not specifically address time frames as the committee determined that should be left within the discretion of the court depending upon circumstances. RPJC 15(B) permits service of the motion upon the probation officer and parties by fax or other electronic means, in addition to service by mail or hand delivery. The addition of this language reflects current practice and will assist practitioners given

the limited time frames in delinquency proceedings. RPJC 15(C) restates language found in RPJC 6.1(H)(2) but permits the granting of a continuance upon a showing of good cause rather than extraordinary circumstances as now required. The committee determined that the rights of the juvenile to a speedy trial are adequately protected by these rules and that the integrity of the process will be enhanced by permitting the court to determine the appropriateness of a continuance based upon a showing of good cause. **RPJC 15(C) also requires the court to consider the victim's right to a timely adjudication when determining whether to grant a continuance and incorporates language found in A.R.S. 8-414.**

#### **RPJC 16. Discovery.**

RPJC 16 governs the discovery process statewide. Most counties do not have local rules addressing this area and practices vary greatly from county to county. The committee agreed, after much debate, that the process should be uniform in order to ensure due process and fairness to all parties. The language in this rule substantially incorporates the language in Rule 7.2, Maricopa County Superior Court-Local Rules, with some exceptions. RPJC 16(C)(2) requires that a notice of defenses and list of witnesses be provided to the county attorney within fifteen days of the advisory hearing rather than twenty days as required by local rule. RPJC 16 omits paragraph (g) of Rule 7.2.

#### **RPJC 17. Computation of Time.**

RPJC 17 restates language found in RPJC 6.1(G). RPJC 17 additionally provides for the exclusion of time, not to exceed thirty days, in order for the parties to prepare for hearing once the juvenile has been restored to competency or taken into custody following the issuance of a warrant for the juvenile's failure to appear. RPJC 17(A)(4) specifically excludes delay occasioned

by the juvenile's referral to a diversion of community based alternative program. The committee agreed it was important to exclude time under these circumstances given the time frames within which to bring a case to trial.

#### **RPJC 18. Duties of Counsel/Speedy Justice.**

RPJC 18(A)&(B) restate language found in RPJC 6.1(A)(3)&(4). RPJC 18(C) restates most of the language found in RPJC 6.1(J) and adds language found in Rule 16.6(d), Ariz. R. Crim. P., clarifying the standard the court should use when determining whether to dismiss with or without prejudice.

#### **RPJC 19. Records and Proceedings.**

RPJC 19(A)(1) restates most of the language found in RPJC 19.1(a). RPJC 19(A)(2) restates the language found in RPJC 19.1(b) and includes treatment records as part of the social records. The committee determined those records of the juvenile's participation in residential or outpatient treatment programs should be specifically included in the social file. RPJC 19(B) addresses proceedings and incorporates much of the language found in RPJC 7(c), with the addition of diversion proceedings which are open to the public. RPJC 19(B) also incorporates language found in RPJC 13(b) regarding transfer hearings. RPJC 19(B)(1) provides that the court hold a hearing prior to determining whether the proceeding should be closed to the public and sets forth the factors the court may consider in making its determination.

#### **RPJC 20. Intercounty Transfers.**

RPJC 20 is a new rule governing procedures for the transfer of cases between counties for purposes of conducting disposition hearings, providing courtesy probation supervision and the transfer of probation cases. This rule formalizes practices among many counties and seeks to

clarify the responsibilities of the original jurisdiction and the receiving jurisdiction, such as the collection of restitution and violations of probation. This rule would eliminate those circumstances where a juvenile's probation is transferred for supervision to another county which may or may not be able to sufficiently monitor the terms and conditions originally imposed. In those cases where the transfer of supervision is sought, the probation officer in the receiving county must request that the receiving court conduct a review of the original terms imposed and may affirm or modify as appropriate.

#### **RPJC 21. Rights of Victims.**

**RPJC 21 sets forth the rights of victims in juvenile proceedings, including the victim's right to be present at all proceedings where the juvenile has a right to be present. While the original petition did not incorporate specific statutory provisions within the rules, the amended petition does so in order to ensure compliance with these mandates.**

#### **RPJC 22. Pre-Petition Investigation and Diversion.**

RPJC 22 reorganizes and restates language found in RPJC 2. RPJC 22(A) sets forth the contents of a referral with more specificity than currently required. The committee determined that the contents of the referral should be the same as those of a petition to ensure sufficient information is available for purposes of conducting a probable cause hearing. **RPJC 22(C) mandates that the court inform the victim if the juvenile is accepted into a diversion program, as required by A.R.S. 8-388.**

#### **RPJC 23. Detention and Probable Cause Hearing.**

RPJC 23 reorganizes existing RPJC 3 and separates provisions relating to detention from provisions relating to a probable cause determination. RPJC 23(A) restates language found in

RPJC 3(A). RPJC 23(B) restates language found in RPJC 3(C) and combines the provisions found in RPJC 3(J)&(K). RPJC 23(B)(2) incorporates the provision for proceeding in the absence of a parent, as currently found in RPJC 3(I). RPJC 23(C) requires that the probable cause hearing be held within twenty-four hours of the time of initial detention. This change is contingent on the acceptance of the proposed change to the time in which to file a petition, which would exclude weekend and holidays from the current twenty- four hour period. The majority of the committee determined that even if the time for filing the petition was extended beyond twenty-four hours, by requiring that the probable cause hearing be held with twenty-four hours of initial detention, this rule will satisfy the requirements of *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). If the time for filing the petition remains the same, the provisions of RPJC 3(D) should remain the same. RPJC 23(D) restates language found in RPJC 3(B) and incorporate language found in RPJC 3(F). RPJC 23(D) references the Arizona Ticket and Complaint form as a charging document in lieu of a petition, as currently authorized in RPJC 11. **RPJC 23(D) further states that the victim has the right to be heard at the detention hearing, as permitted by A.R.S. 8-401.** RPJC 23(E) requires the court to inform the juvenile, upon release from detention, of the consequences of failing to appear at future proceedings. The committee determined such an admonition was warranted given the consequences of adjudication as a delinquent. **RPJC 23(E) also requires that the court provide the victim with a copy of the juvenile's terms and conditions of release if requested by the victim, pursuant to A.R.S. 8-387.** RPJC 23(F) outlines procedures for revocation of release where the juvenile violates conditions of release **and provides that a victim may file a motion to revoke release if the requirements of A.R.S. 8-411 are met.** RPJC 23(G) restates language found in RPJC 3(G).

RPJC 23(H) restates language found in RPJC 6.1(I) **and allows the victim to be heard at the review of detention hearing, as permitted by A.R.S. 8-402.**

**RPJC 24. Contents of a Petition.**

RPJC 24 restates language found in RPJC 4 and provides that the petition must be filed by the prosecutor. RPJC 24(B) requires that a copy of a motion to amend be provided to the parties.

**RPJC 25. Filing of a Petition.**

RPJC 25 governs procedures and time frames within which to file a petition for detained and non-detained juveniles. RPJC 25(B)(1)&(2) incorporate the provisions found in RPJC 3(D) and RPJC 6.1(B) except the proposed rule excluded weekends and holidays from the computation of time. Given that proposed RPJC 23 requires a probable cause hearing within twenty-four hours of detention and proposed RPJC 22 requires that the referral contain the same information as would appear in a petition, the committee determined that excluding weekends and holidays from the twenty-four hours in which to file a petition would not impact the juvenile's due process rights or cause significant delay in the proceedings. RPJC 25(C) restates language found in RPJC 6.1(B)(3) and replaces language concerning the juvenile's compliance with language concerning eligibility as the juvenile could be ineligible for diversion for a number of reasons, including failure to comply.

**RPJC 26. Service of Petition and Notice to Appear.**

RPJC 26 reorganizes RPJC 5 and separates procedures governing service of the petition and notice to appear from those governing service of subpoenas. RPJC 26(A) incorporates and reorganizes language found in RPJC 5(A)&(D), replacing the term "citation" with "notice to appear" and mandating the appearance of the juvenile's parent, guardian or custodian. RPJC 26(A)(4) requires that the notice to appear advise the party of the possible consequences for

failure to appear. This provision is necessary to ensure due process for the party should the court attempt to hold the party in contempt at some future date. RPJC 26(B) governs the persons to be served and the manner of service, as found in RPJC 5(A)&(C), except that there must be personal service unless otherwise approved by the court. This proposed change reflects current practice and ensures that the juvenile receives actual notice of the proceedings. RPJC 26(C) incorporates language found in RPJC 5(G) but requires the court to set an order to show cause hearing prior to proceeding with a contempt hearing. It also requires that the person to be held in contempt be served with notice of the contempt hearing. RPJC 26(D) specifically sets forth the court's authority to issue a warrant for the arrest of a juvenile for failure to appear.

#### **RPJC 27. Subpoenas.**

RPJC 27 governs procedures for issuance and service of subpoenas. RPJC 27(A) incorporate language found in RPJC 5(E) and requires that the person be advised of possible consequences of failure to appear. RPJC 27(B) incorporates language in RPJC 5(F). RPJC 27(C) incorporates language found in RPJC 5(G) but requires the court to set an order to show cause hearing prior to proceeding with a contempt hearing. It also requires that the person to be held in contempt be served with notice of the contempt hearing.

#### **RPJC 28. Advisory Hearing.**

RPJC 28 governs procedures at the advisory hearing. RPJC 28(A) incorporates language found in RPJC 6(A)&(B). RPJC 28(B) incorporates language found in RPJC 6.1(C). RPJC 28(C) incorporates language found in RPJC 6(B)&(D) and requires the court to advise the juvenile of the right to confront witnesses. RPJC 28(C)(5) requires that the court determine whether the juvenile understands the rights identified by the court and whether any waiver of rights is knowingly, intelligently and voluntarily made. This language was added upon the committee's

determination that juveniles should be afforded the same rights and protections as adults in the criminal system. **RPJC 28(C)(6) requires that the court, prior to accepting a plea, determine whether the prosecutor has complied with the requirements of A.R.S. 8-403 as it relates to the right of the victim to be advised of the plea agreement and the right to be heard.** RPJC 28(C)(7)(a) governs the procedure for accepting a plea at the advisory hearing. RPJC 28(D) requires that the court's findings be in writing and reflect that there was a valid waiver of rights and a factual basis upon which to adjudicate the juvenile.

### **RPJC 29. Adjudication Hearing.**

RPJC 29 governs procedures at the adjudication hearing. RPJC 29(B) restates language found in RPJC 6.1(D)(1)(2)&(3). RPJC 29(C) restates the burden of proof. RPJC 29(D) restates language found in RPJC 7(a) but omits reference to the admissibility of the juvenile's statements. The committee determined that the admissibility of statements is sufficiently covered in case law and did not need to be restated in the rule. RPJC 29(D)(1)&(2) incorporate, as applicable to juvenile proceedings, language found in Rules 13.5(b) & Rule 20, Ariz. R. Crim. P. The additions of these provisions reflect current practice.

### **RPJC 30. Disposition.**

RPJC 30 reorganizes provisions found in RPJC 6.1(F), RPJC 8 and RPJC 9. RPJC 30(A) reorganizes language found in RPJC 9, details what should be contained in the disposition report and sets the time limit for submission of the report. **RPJC 30(A)(2) sets forth the information which shall be made available to the victim, if requested, pursuant to A.R.S. 8-404(C).** RPJC 30(A)(3) permits the waiver of a disposition report upon stipulation of the parties and order of the court, provided the victim did not provide a written impact statement as permitted in

A.R.S. 8-404. RPJC 30(B)(1) restates language found in RPJC 6.1(F). RPJC 30(B)(2) restates language found in RPJC 8(a) **and permits the victim to be present and address the court pursuant to A.R.S. 8-405(B).** RPJC 30(B)(3) restates language found in RPJC 8(b). RPJC 30(B)(4) restates language found in RPJC 8(c).

### **RPJC 31. Probation.**

RPJC 31 reorganizes language found in RPJC 10,10.1&10.2, combining those provisions into one rule. **RPJC 31(C) requires to court, if requested, to notify the victim of any proposed modification of the juvenile's probation, as set forth in A.R.S. 8-396(B) and permits the opportunity for the victim to be heard, pursuant to A.R.S. 8-406(B).** **RPJC 31(D) requires the court, if requested, to notify the victim of any proceeding to terminate the juvenile's probation and permits the victim to be heard at such a proceeding, as set forth in A.R.S. 8-396(A) & 8-406(A).**

### **RPJC 32. Revocation of Probation.**

RPJC 32 governs procedures for the revocation of probation. RPJC 32(A) restates language found in RPJC 10.3(a) **and requires the court, if requested, to notify the victim of any probation revocation disposition proceeding and permit to victim to be heard at the proceeding, as set forth in A.R.S. 8-396(A) & 8-406(A).** RPJC 32(B) restates language found in RPJC 10.3(b). RPJC 32(B)(1)(2)&(3) mirror provisions found in RPJC 26(A)(B)&(C). RPJC 32(B)(4) mirrors language found in RPJC 24(B). RPJC 32(C) restates language found in RPJC 10.3(c), replacing the term "reasonable cause" with "probable cause." RPJC 32(D) reorganizes and incorporates language found in RPJC 10.3(c) and 10.4(a)&(b), following the format in RPJC 28, **including a determination by the court that the plea is taken in accordance with A.R.S. 8-403 to ensure protection of the victim's rights.** RPJC 32(E)(1) restates language found in

RPJC 10.4(e). RPJC 32(E)(2)&(3) restates language found in RPJC 10.4(g). RPJC 32(E)(4) restates language found in RPJC 10.4(h). RPJC 32(E)(5) restates language found in RPJC 10.4(i)&(k). RPJC 32(E)(6) restates language found in RPJC 10.4(j).

### **RPJC 33. Disposition of Non-Felony Offenses.**

RPJC 33 replaces RPJC 11 and addresses service of the citation. There was much debate among committee members on the development of procedures governing non-felony offenses. It was determined that the major issues facing the court could not be addressed through rules as each county processes such cases very differently. It was determined that statutory changes were needed to address the tracking of juveniles between the lower courts and the juvenile court, **which was accomplished through SB 1024, signed by the Governor on March 21, 2000, which amends A.R.S. 8-323.**

### **RPJC 34. Transfer for Criminal Prosecution.**

RPJC 34 reorganizes RPJC 12,13&14 and omits those provisions which are no longer applicable due to the enactment of A.R.S. 8-327. RPJC 34(A)(B)&(B1) restates language found in RPJC 12(a). RPJC 34(D) restates language found in RPJC 6.1(E)(1). RPJC 34(E) restates language found in RPJC 12(b). RPJC 34(E)(1) restates language found in RPJC 12(c) and sets forth the time in which reports are to be provided to the court and parties. This rule also provides for the redaction of statements made by the juvenile, in the course of a psychological or psychiatric examination, concerning the pending offense and mirrors language found in Rule 11.4(a), Ariz. R. Crim. P. RPJC 34(E)(2) restates language found in RPJC 12(e). RPJC 34(E)(3) clarifies language found in RPJC 12(d). RPJC 34(F) restates language found in RPJC 14(A). RPJC 34(F)(1) restates language found in RPJC 6.1(E)(2). RPJC 34(F)(1)(a) expands language found

in RPJC 14(A) and provides procedural safeguards for those juveniles who may waive the evidentiary hearing. RPJC 34(F)(2)(a)&(b) restate language found in RPJC 14(B). RPJC 34(F)(2)(c) restates language found in RPJC 14(C) and permits the court to find probable cause as to lesser included offenses. RPJC 34(F)(2)(d) restates language found in RPJC 14(B) and clarifies that any dismissal shall be without prejudice. RPJC 34(F)(2)(e) restates language found in RPJC 14(B) but only requires the filing of the transcript if the juvenile is transferred. The committee determined that it was not necessary to require the filing of the transcript unless the juvenile is transferred and requiring counties to do so is a financial hardship. In the event of an appeal by the state, a transcript could be requested. RPJC 34(F)(3) eliminates the factors the court should consider, as outlined currently in RPJC 14(C), as those factors are set forth in A.R.S.8-327(D). The statute no longer includes presumptive reasons for transfer so RPJC 14(D)&(C) have been eliminated. RPJC 34(F)(5) restates language found in RPJC 6.1(E)(3) and permits the complaint to serve as the petition for purposes of further juvenile proceedings. The committee determined that the requirements of a criminal complaint substantially comply with the requirements of a petition insofar as advising the juvenile of the charges.

### **RPJC 35. Post Transfer.**

RPJC 35(A)(1)&(2) restate language found in RPJC 14(G). RPJC 35(A)(3) restates language found in RPJC 14(H). RPJC 35(A)(4)&(5) restates language found in RPJC 14(I).

### **RPJC 14.1 Detention as a Term of Adult Probation.**

RPJC 14.1 has been eliminated from the proposed rules as it is in conflict with current law.

A.R.S. 13-921 governs probation for juveniles convicted as adults. While the statute permits the court to order the juvenile to participate in services available through the juvenile court, it specifically provides for incarceration in the county jail as a term of probation.

## **PART III DEPENDENCY, GUARDIANSHIP AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS.**

### **RPJC 36. Scope of Rules.**

RPJC 36 restates language found in RPJC 1(A) and provides guidance to the court and practitioner when interpreting these rules in light of the requirements of the Adoptions and Safe Families Act.

### **RPJC 37. Definitions.**

RPJC 37 restates some of the language found in RPJC 1(C), adding the Department of Economic Security or the petitioner, any person who has formally intervened in the proceedings and any party as defined by the Indian Child Welfare Act as recognized parties, **including the Indian custodian**. The proposed rule omits the non-Indian custodian as a recognized party, although a custodian may have the right to a temporary custody hearing if the child was removed from the custodian's care. RPJC 37(B) was added to ensure compliance with federal law which requires that foster parents receive notice of and the right to participate in some proceedings. **RPJC 37(C) sets forth definitions included within the Indian Child Welfare Act, including placement preferences.**

### **RPJC 38. Assignment, Appointment of Counsel.**

RPJC 38 distinguishes the assignment of counsel from the appointment of counsel. This distinction is necessary in light of Model Court legislation which mandates the assignment of counsel prior to the preliminary protective hearing and prior to a determination of indigence. RPJC 38(B) identifies the procedure for determining indigence and mirrors language found in

Rule 6.4, Ariz. R. Crim. P. While in most instances assigned counsel will be formally appointed to represent the parent, there may be circumstances where the parent does not qualify for appointed counsel. Therefore, the committee determined that assigned counsel should not have the authority to accept service of process on behalf of a parent who fails to appear at the preliminary protective hearing. **The term “Indian custodian” is included in this rule and appears throughout the rules wherever there is mention of the parent or guardian.**

#### **RPJC 39. Appearance of Counsel.**

RPJC 39(A) incorporates some of the language found in RPJC 21. RPJC 39(B) specifies circumstances under which representation terminates and no longer references Rule 80(e), Ariz. R. Civ. P. as that rule has been abrogated.

#### **RPJC 40. Appointment of Guardian Ad Litem.**

RPJC 40 incorporates language found in RPJC 22 but no longer identifies specific circumstances under which the court may appoint a guardian ad litem but simply permits the court to do so in order to protect the best interests of the child. RPJC 40(B) permits the appointment of a guardian ad litem for a parent if the parent is eighteen or younger. RPJC 22 currently permits such an appointment for a parent twenty-one years of age or younger. The committee determined that the legal rights of a parent between the ages of eighteen and twenty, who is already represented by an attorney, would be adequately protected without the additional appointment of a guardian ad litem, unless the parent is otherwise incompetent. RPJC 40(C) expands upon language currently found in RPJC 22 by requiring that an investigation be conducted to determine competency prior to the appointment of a guardian ad litem for a parent. The Court of Appeals, *In re Maricopa County, Juvenile Action No. JD-6982*, 186 Az. 354, 922 P.2d 319 (1996), made

the assumption in a footnote that a competency determination is made by the juvenile court prior to the appointment of a guardian ad litem. It was the committee's determination that such a review should, in fact, occur and should be mandated by these rules.

**RPJC 41. Attendance at Hearings.**

RPJC 41 incorporates language found in RPJC 19, deleting RPJC 19(b)(1) and (b)(3). The ability of the court to exclude a child from the proceedings is addressed within RPJC 41(A). RPJC 41(B) permits the court to limit the participation by non-parties who are authorized by law to participate in certain proceedings.

**RPJC 42. Telephonic Testimony, Video Conferencing.**

RPJC 42 incorporates language found in RPJC 19.2 and would authorize the use of video conferencing in addition to telephonic testimony and argument. Guardianship proceedings are now included in the proposed rule.

**RPJC 43. Computation of Time.**

RPJC 43 specifically references Rule 6, Ariz. R. Civ. P. in determining computation of time and reflects current practice.

**Rule 44. Disclosure and Discovery.**

RPJC 44 formalizes discovery and disclosure in order to ensure that the due process rights of parents and children are protected without causing undue delay in the proceedings. RPJC 44(A) outlines the information subject to disclosure and directs that such disclosure be made in the least burdensome and most cost effective means and reflects current practice. RPJC 44(B) requires ongoing disclosure of documents and the disclosure of witness lists and exhibits within sixty days of the preliminary protective hearing if the matter is not otherwise resolved. RPJC 44(E)

specifically limits the use of civil discovery methods unless the parties agree or the court authorizes such methods. Given the nature of the proceedings and the time limits for bringing these actions to trial, safeguards should be in place to protect against abuses of the discovery process which would result in undue delay. RPJC 44(G) authorizes the court to impose sanctions on the parties for failure to disclose information in a timely manner. However, the proposed rule requires that the best interests of the child be kept in mind when imposing sanctions.

#### **RPJC 45. Admissibility of Evidence.**

RPJC 45(A) clarifies the applicability of the Arizona Rules of Evidence in dependency, guardianship and termination proceedings. RPJC 45(B) defines the term report and addresses the content of a report, **including whether the Indian child's placement falls with the preferences set forth in the Indian Child Welfare Act.** This paragraph specifically excludes reports authored by someone other than the protective services worker. RPJC 45(C) incorporates language found in RPJC 16.2(m) but requires disclosure of a report fifteen days prior to a hearing rather than thirty days which the rule now requires. RPJC 45(D) restricts the purposed for which the report may be used as such reports traditionally contain double and sometimes triple hearsay. RPJC 45(E) clarifies A.R.S. 8-537(B) regarding the admissibility of social studies. RPJC 45(F) incorporates language found in A.R.S. 8-237 concerning the admissibility of statements made by a child.

#### **RPJC 46. Motions.**

RPJC 46 formalizes motion practice in dependency, guardianship and termination proceedings. RPJC 46(A) requires that the party filing the motion state the positions of the other parties in order to expedite the court's ability to rule on uncontested matters and reflects current practice. RPJC 46(B) would permit service of a motion by fax or electronic means in addition to mail and

hand delivery and reflects current practice. RPJC 46(C) sets forth response times and clarifies what constitutes completion of service for motions served by hand delivery, fax or electronic means. RPJC 46(D) specifically authorizes the filing of motions for summary judgment. RPJC 46(E) specifically authorizes the filing of motions to set aside judgments and differs from Rule 60(c), Ariz. R. Civ. P., by reducing the time in which to file the motion. RPJC 46(F) incorporates some of the language found in RPJC 17.1(a) and requires that the requesting party advise the court of any impending time limits.

#### **RPJC 47. Release of Information.**

RPJC 47 replaces RPJC 19.1 as it relates to non-criminal proceedings. While there is a need to distinguish the legal and social files in the context of delinquency proceedings, that need does not exist for non-criminal files as all information is confidential. RPJC 47 does not incorporate language currently found in RPJC 19.1(c) as amendments to the confidentiality statute, A.R.S. 8-807, enacted after the adoption of RPJC 19.1(c) substantially incorporates those entities identified in RPJC 19.1(c).

#### **RPJC 48. Petition, Temporary Orders, Notice of Hearing and Service of Process.**

RPJC 48 reorganizes and incorporates much of the language found in RPJC 15. RPJC 48(A) now requires that the petition state whether the child is an Indian child as defined by the Indian Child Welfare Act. This addition to the rule is necessary in order to ensure compliance with A.R.S. 8-841 and the Indian Child Welfare Act. RPJC 48(B) restates language found in RPJC 15(b). RPJC 48(C) requires that the notice of hearing advise the parent or guardian of the consequences of failure to appear and incorporates language contained in A.R.S. 8-826 and 8-844. Such notification is imperative given the consequences of failure to appear for dependency hearings.

RPJC 48(D) reorganizes and incorporates language found in RPJC 15(a), provides for service upon the parent or guardian appearing at the preliminary protective hearing, pursuant to A.R.S. 8-841(E) **and outlines the notice requirements as set forth in the Indian Child Welfare Act.** **RPJC 48(D)(9)(a) permits the parent, Indian custodian or the tribe to waive the ten (10) day notice requirement of the Act in order to proceed with the preliminary protective hearing, and is reflective of current practice in some counties.** RPJC 48(E) authorizes the amendment of petitions and clarifies how the petition is to be served. Amendments alleging new allegations against a parent or guardian may be served pursuant to Rule 5(c), Ariz. R. Civ. P. as the requirements of Rules 4.1 and 4.2, Ariz. R. Civ. P. would have been met when the petition was originally filed. The proposed rule gives sufficient time prior to trial to defend against new allegations, thereby protecting the parent's right to due process without delaying the proceedings.

#### **RPJC 49. Pre-Hearing Conference.**

RPJC 49 incorporates language found in RPJC 16(a-e) and sets forth the procedure to be followed at the pre-hearing conference. The proposed rule requires the facilitator be independent and not representative of any party to the proceedings. However, a note to the rule attempts to clarify that the use of a facilitator or mediator from the child welfare mediation program established within the office of the attorney general is permissible. The provision is designed to ensure that the assistant attorney general assigned to the dependency case does not serve as facilitator, which has happened in the past.

#### **RPJC 50. Preliminary Protective Hearing.**

RPJC 50 incorporates and expands upon language found in RPJC 16(e)(8-10), attempts to clarify related statutory provisions and is reflective of current practice. RPJC 50(B) outlines the procedure to be followed during the hearing, including the formal appointment of counsel and an

inquiry into the applicability of the Indian Child Welfare Act. RPJC 50(C) identifies some of the findings and orders the court is required to make and provides that the parent or guardian be advised of the consequences of failure to appear at subsequent proceedings, as required by A.R.S. 8-826. **RPJC 50(C)(3) requires that the child's status as an Indian child be verified by the petitioner if the court has reason to believe the child may be an Indian child.** RPJC 50 further requires the court to enter appropriate findings, using the standard and burden of proof, as required by the Indian Child Welfare Act, if applicable.

#### **RPJC 51. Review of Temporary Custody.**

RPJC 51 incorporates language found in RPJC 16.1 but deletes language relating to the admissibility of hearsay. RPJC 16.1(c)(1-7) merely restates language found in A.R.S. 8-825(A) and is unnecessary. RPJC 51(B) outlines the burden of proof, **including the burden of proof with respect to an Indian child, as set forth in the Indian Child Welfare Act.** RPJC 51(C)(2) attempts to clarify language in A.R.S. 8-824(E)(3) by permitting testimony concerning placement, visitation and services only as it relates to the issue of continued custody. RPJC 51(C)(3) departs from the procedure set forth in RPJC 16.1 by permitting the parent or guardian to present evidence prior to the court making its determination of probable cause. Under the current rule, the parent may be denied the opportunity to present evidence if the court finds the offer of proof insufficient to rebut a finding of probable cause. RPJC 51(D) sets forth the findings and orders the court shall enter at the conclusion of the hearing, including the specific findings required by the Indian Child Welfare Act.

## **RPJC 52. Initial Dependency Hearing.**

RPJC 52 reorganizes and expands upon procedures set forth in RPJC 16.2(a-g). RPJC 52(C) requires the court to inquire as to the applicability of the Indian Child Welfare Act at this early stage of the proceedings, **pursuant to A.R.S. 8-815**. RPJC 52(C)(6)(a)&(c) set forth the procedure for adjudicating the child dependent based upon an admission by the parent or the failure of the parent to appear. **RPJC 52(D)(3) requires that the child's status as an Indian child be verified by the petitioner if the court has reason to believe the child may be an Indian child.** RPJC 52(D)(8) incorporates statutory language advising the parent or guardian of the consequences of failure to appear at future proceedings. **RPJC 52(D)(9) requires that the court make findings concerning the child's placement, as required by the Indian Child Welfare Act, to ensure the placement falls within the preferences set forth in the Act or that there is good cause to deviate from the preferences.** RPJC 52(E) expands upon RPJC 16.2(f) by permitting a continuance of the hearing in order to comply with the requirements of the Indian Child Welfare Act. The proposed rule requires that the court make findings according to the standard and burden of proof set forth in the Indian Child Welfare Act, if applicable.

## **RPJC 53. Settlement Conference.**

RPJC 53 outlines procedures for conducting a settlement conference and seeks to create some uniformity statewide. RPJC 53(B) requires the submission of a settlement conference memorandum and incorporates language found in Rule VI(e)(3), Uniform Rules Practice. This rule is reflective of current practice in some locations and outlines procedures for adjudicating the child dependent based upon the admission of a parent or the failure of a parent to appear at the settlement conference. The rule requires that any findings made with regard to an Indian child be

made in accordance with the standards and burdens of proof set forth in the Indian Child Welfare Act, **including whether the child's placement falls within the placement preferences set forth in the Act.** RPJC 53(D)(4) requires that the court again address the parent and advise them of the consequences of failure to appear and participate in reunification services.

#### **RPJC 54. Pretrial Conference.**

RPJC 54 outlines procedures for conducting a pretrial conference and seeks to create some uniformity statewide. The purpose of the pretrial conference is to provide another opportunity for the parties to settle the matter or, if settlement is not possible, to resolve issues related to the trial. This rule also outlines procedures for adjudicating the child dependent based upon the admission of a parent or the failure of a parent to appear at the pretrial conference. RPJC 54(C)(4) again requires the court to advise the parent of the consequences of failure to appear and participate in reunification services.

#### **RPJC 55. Dependency Adjudication Hearing.**

RPJC 55 outlines the procedure for adjudicating a child dependent and incorporates some of the language found in RPJC 16.2(i)(j)(k)&(l). RPJC 55(B) replaces RPJC 17,17.1&17.2 relating to continuances. A.R.S. 8-842 requires that the adjudication hearing be held within ninety days of service of the petition and may be continued up to thirty days for good cause. The proposed rule requires that any continuance beyond one hundred and twenty days be based upon a finding of extraordinary circumstances. RPJC 55(B) attempts to clarify what constitutes extraordinary circumstances, incorporating language found in A.R.S. 8-861(D), and sets forth the procedure for requesting such a continuance. It was the opinion of the committee that the trial judge is in the best position to evaluate the merits of any request to continue and due to strict time limits

outlined in statute, the need for RPJC 17.1 & 17.2 no longer exists. RPJC 55(C) sets forth the burden of proof, incorporating RPJC 18(3) **and now includes the burden of proof with regard to an Indian child.** RPJC 55(D) incorporates language found in RPJC 16.2(i) and sets forth the procedure to adjudicate a child dependency based upon an admission, a plea of no contest or the failure of a parent to appear. RPJC 55(E) outlines the findings and orders the court must enter at the conclusion of the proceedings and requires that findings made with regard to an Indian child conform to the requirements of the Indian Child Welfare Act. RPJC 55(E)(6) requires the court to again advise the parent concerning the consequences of failure to appear and participate in reunification services. The comment to this rule urges the court to provide the parent with a written copy of the admonition, in the form of a minute entry or a separate document as appears in Form I. Although some members of the committee believe it is unnecessary to provide these warnings at proceedings other than the preliminary protective hearing, the dependency adjudication hearing and the permanency hearings, it was determined that no harm would come from doing so.

#### **RPJC 56. Disposition Hearing.**

RPJC 56 incorporates and expands upon language found in RPJC 16.3. RPJC 56(B) incorporates language found in RPJC 16.3(a). RPJC 56(C) incorporates language found in RPJC 16.3(b). RPJC 56(D) directs the court to enter temporary dispositional orders pending a hearing on reunification services if a request to discontinue services has been made and the matter cannot be heard at the time of disposition. This provision is in compliance with A.R.S. 8-844(D) which requires that a disposition hearing be held no later than thirty days after the dependency adjudication hearing. RPJC 56(D) also outlines the type of evidence the court may consider and

differs from RPJC 16.3(c) in its attempt to limit the use of hearsay at this hearing, given the importance of the dispositional phase of the proceedings. RPJC 56(E) outlines the findings and orders the court must make and directs that the parent again be advised of the consequences of failure to appear at future proceedings and participate in reunification services.

#### **RPJC 57. Provision of Reunification Services Hearing.**

RPJC 57 outlines procedures for determining whether reunification services should continue to be provided and is an attempt to clarify provisions found in A.R.S. 8-846. Once reunification services are discontinued, the case will most likely proceed to guardianship or termination of parental rights. The committee determined that strict procedures were needed in order to protect the due process rights of the parent and ensure permanency for the child. RPJC 57(C) requires that the court make its findings by clear and convincing evidence prior to terminating services. A.R.S. 8-846(B)&(C) set forth two different standards, depending upon the existence of a statutory presumption that services should not continue. As the ultimate consequence to the parent and child are the same if the court terminates services, the committee determined that the same burden of proof should apply whether the petitioner is proceeding pursuant to A.R.S. 8-846(B) or (C).

#### **RPJC 58. Review Hearing.**

RPJC 58 outlines procedures for reviewing the status of dependent children, as required by state and federal law. RPJC 58(B) requires the submission of a report fifteen days prior to the hearing, rather than thirty days which is required pursuant to RPJC 16.2(m). Given the dynamics of dependency cases, court reports prepared closer in time to the hearing more accurately reflect the status of the case. This provision is consistent with proposed RPJC 45(C). RPJC 58(C) requires

that any party requesting a contested hearing advise the court prior to the hearing. This provision is necessary to ensure litigants have notice of potential issues and the court allows sufficient time to hear the matter. RPJC 58(E) sets forth the findings the court should make at the conclusion of the hearing, again requiring that those findings be made pursuant to the Indian Child Welfare Act, if applicable. The rule also requires the court to admonish the parent concerning the consequences of failure to appear and participate in services, if reunification services have been ordered.

### **RPJC 59. Initial Permanency Hearing.**

RPJC 59 incorporates provisions found in A.R.S. 8-861 and outlines procedures for determining whether the child can be returned to the custody of the parent at this stage of the proceedings.

RPJC 59(B) sets forth the statutory time limits within which the hearing must occur. RPJC 59(C) requires the submission of a report to the court in order to assist the court in making its determination and incorporates language found in RPJC 16.4(c). RPJC 59(E) sets forth the findings the court is required to make and directs that a permanency hearing be set if the child is not returned to the parent. Again, the court is required to admonish the parent and make findings pursuant to the Indian Child Welfare Act, if applicable. RPJC 59(F) permits the court to consolidate the permanency hearing with the guardianship or termination hearing so long as the applicable statutory time limits are not exceeded. **This provision is consistent with language in A.R.S. 8-864, created by SB1160, which was signed by the Governor on April 24, 2000** and eliminates undue delay once the determination has been made that reunification is no longer the case plan.

### **RPJC 60. Permanency Hearing.**

RPJC 60 replaces RPJC 16.4 and outlines more specific procedures for the implementation of A.R.S. 8-862. RPJC 60(B) sets forth the statutory time limits within which the hearing must be held. RPJC 60(D) sets forth the findings and orders the court must enter, including an order that a guardianship or termination motion be filed, pursuant to A.R.S. 8-862(D)(1) or (E)(1). This proposed rule is needed to ensure uniformity in the manner in which this hearing is conducted, given the consequences to the parties. Currently, some courts treat permanency hearings similar to review hearings while other courts treat permanency hearings as condensed guardianship or termination trials.

### **RPJC 61. Motion, Notice of Hearing, Service of Process and Orders.**

RPJC 61 outlines the procedure for initiating Title 8 guardianship proceedings. RPJC 61(A) incorporates language found in A.R.S. 8-862(E)(1). RPJC 61(B) incorporates language found in A.R.S. 8-872(C) and requires that the parent be advised of the consequences of failure to appear at the initial guardianship hearing. This provision is necessary to correct what appears to be a statutory oversight. A.R.S. 8-863 permits the court to terminate parental rights based upon the parent's failure to appear, but there is no similar provision for guardianship proceedings. This inconsistency is addressed by requiring that the same admonitions and notice requirements apply to both types of proceedings. RPJC 61(C) identifies the manner of service, as required by A.R.S. 8-872(B) **and sets forth the notice requirements of the Indian Child Welfare Act, if applicable.** RPJC 61(C)(1) **permits the parent, Indian custodian or the tribe to waive the ten (10) day notice requirement of the Act in order to proceed with the initial guardianship hearing, and is reflective of current practice in some counties.** RPJC 61(D) incorporates

language found in A.R.S. 8-872(E) and requires that the report be provided ten days prior to the initial guardianship proceeding. By requiring the report to be made available at the initial guardianship hearing, the court would have the information necessary to grant or deny the motion should the parent fail to appear or not object to the establishment of the guardianship. **RPJC 61(D) also requires that the report address whether the prospective guardian falls within the placement preferences set forth in the Indian Child Welfare Act, if applicable, or whether there is good cause to deviate from the placement preferences.**

#### **RPJC 62. Initial Guardianship Hearing.**

RPJC 62 incorporates provisions of A.R.S. 8-872, outlines procedures for conducting an initial hearing and mirrors the procedure set forth in RPJC 52 pertaining to dependency proceedings. RPJC 62(B) sets forth the time limits as required by A.R.S. 8-862(E)(2). RPJC 62(C) sets forth what should occur at the hearing, including provisions for granting a guardianship at this stage of the proceedings should the parent fail to appear or not object to the guardianship. This rule requires that the parent be advised of their rights, including the right to trial. Once again, the court is required to inquire as to the applicability of the Indian Child Welfare Act before proceeding. RPJC 62(D) sets forth the findings and orders the court should enter at the conclusion of the hearing, including scheduling a settlement conference or mediation, if appropriate. The proposed rule requires that the court address the parent and advise them of the consequences of failure to appear at subsequent proceedings **and to make findings concerning whether the child's placement falls within the placement preferences of the Indian Child Welfare Act, if applicable.**

### **RPJC 63. Guardianship Adjudication Hearing.**

RPJC 63 outlines the procedure for appointment of a permanent guardian for a dependent ward of the court. RPJC 63(B) incorporates language found in A.R.S. 8-862(E)(2) but permits an additional thirty-day continuance if a continuance is necessary and would not adversely impact the child. Any continuance beyond one hundred and twenty days must be based upon a finding of extraordinary circumstances. Although A.R.S. 8-862(E)(2) requires that the guardianship adjudication hearing be set within ninety days of the permanency hearing, it was determined that an absolute time limit would be impossible to administer unless some provisions were made for limited continuances. Proposed RPJC 46(F) requires that any motion to continue be made in good faith and state with specificity the reason for the requested continuance, providing another safeguard to ensure that permanency for the child is achieved in a timely manner. RPJC 63(C) sets forth the burden of proof, as required by A.R.S. 8-872(F) **and sets forth the specific findings the court must make with respect to an Indian child. Although the Indian Child Welfare Act does not specifically reference guardianship proceedings, affording the Indian parent the same protections afforded in termination of parental rights proceedings is consistent with the intent of the Act. While states are required to comply with the requirements of the Act, there is nothing to preclude states from affording Indian families greater protection than that provided by the Act.** RPJC 63(D) sets forth the procedure for determining whether to grant the motion for guardianship at the conclusion of a contested hearing or where the parent fails to appear or agrees to the guardianship. RPJC 63(E) authorizes the submission into evidence of the report required pursuant to A.R.S. 8-872(E). RPJC 63(F) sets forth the findings and orders the court should enter at the conclusion of the hearing, including the

appointment of a guardian if the motion is granted. In the event the guardianship is denied, the parties are required to submit a revised case plan to the court. RPJC 63(F)(4) requires that the court apply the standard and burden of proof required by the Indian Child Welfare Act, if applicable.

**RPJC 64. Motion, Petition, Notice of Hearing and Service of Process.**

RPJC 64 outlines the procedure for initiating a termination of parental rights action. This rule attempts to distinguish procedures for those cases where the child is the subject of a dependency action filed after July 1, 1998 from those cases where the child is not a ward of the court or is the subject of a dependency petition filed prior to July 1, 1998. In 1998 significant statutory changes occurred in response to the Adoptions and Safe Families Act of 1997, P.L.105-89. This Act shifted the focus of dependency proceedings from reunification at all costs to achieving permanency for children in a timely manner, with the focus being the best interests of the child. There were numerous statutory changes made at the time, including the filing of a motion to terminate parental rights as part of the ongoing dependency proceeding rather than as a separate action requiring the filing of a new petition. Service of the motion may be made pursuant to Rule 5(c), Ariz. R. Civ. P. rather than Rule 4.1 & 4.2, Ariz. R. Civ. P., the rationale being that the more formal service requirements would have been met upon the filing of the original dependency proceeding. **RPJC 64(A)&(B) require that the petition or motion indicate whether the child is an Indian child.** RPJC 64(C) requires that the notice of hearing advise the parent of the consequences of failure to appear in order to protect the due process rights of the parent should the court attempt to default the parent, as permitted by A.R.S.8-535(D). RPJC 64(D) sets forth service requirements, **including the notice requirements of the Indian Child Welfare Act, if**

**applicable. RPJC 64(D)(1) permits the parent, Indian custodian or the tribe to waive the ten (10) day notice requirement of the Act in order to proceed with the initial termination hearing, and is reflective of current practice in some counties.**

#### **RPJC 65. Initial Termination Hearing.**

RPJC 65 incorporates provisions of A.R.S. 8-862, outlines procedures for conducting an initial hearing and mirrors the procedure set forth in RPJC 52 pertaining to dependency proceedings.

RPJC 65(B) sets forth the time limits as required by A.R.S. 8-862(D)(2). RPJC 65(C) sets forth what should occur at the hearing, including provisions for terminating parental rights at this stage of the proceedings should the parent fail to appear or not object to the termination. This rule requires that the parent be advised of their rights, including the right to trial. Once again, the court is required to inquire as to the applicability of the Indian Child Welfare Act before proceeding. RPJC 65(D) sets forth the findings and orders the court should enter at the conclusion of the hearing, **including whether the placement is in accordance with the Indian Child Welfare Act, if applicable.** It also requires the court to address the parent and advise them of the consequences of failure to appear at subsequent proceedings.

#### **RPJC 66. Termination Adjudication Hearing.**

RPJC 66 outlines the procedure for terminating parental rights. RPJC 66(B) incorporates language found in A.R.S. 8-862(D)(2) but permits an additional thirty-day continuance if a continuance is necessary and would not adversely impact the child. Any continuance beyond one hundred and twenty days must be based upon a finding of extraordinary circumstances. Although A.R.S. 8-862(D)(2) requires that the termination adjudication hearing be set within ninety days of the permanency hearing, it was determined that an absolute time limit would be impossible to

administer unless some provisions were made for limited continuances. Proposed RPJC 46(F) requires that any motion to continue be made in good faith and state with specificity the reason for the requested continuance, providing another safeguard to ensure that permanency for the child is achieved in a timely manner. RPJC 66(C) sets forth the burden of proof, as required by A.R.S. 8-863(B) **and sets forth the specific findings the court must make with respect to an Indian child.** RPJC 66(D) sets forth the procedure for determining whether to grant the motion or petition for termination at the conclusion of a contested hearing or where the parent fails to appear or agrees to the termination. RPJC 66(E) sets forth the findings the court should make at the conclusion of the hearing, including the requirement that the court apply the standards and burdens of proof as required by the Indian Child Welfare Act if applicable.

## **PART IV ADOPTION.**

### **RPJC 67. Scope of Rules.**

RPJC 67 provides guidance to the court and practitioner when interpreting these rules and ensures compliance with the Adoptions and Safe Families Act, P.L.105-89.

### **RPJC 68. Definitions.**

RPJC 68(A)(1) defines the term parent. The interchangeable usage of the terms “birth parent”, “natural parent” and “biological parent” in statute have created confusion which this rule seeks to clarify. RPJC 68(A)(3) expands upon A.R.S. 8-105(G)&(H) by setting forth all of the information the court should have in its possession prior to granting or denying a request for certification to adopt. **RPJC 68(B) sets forth definitions included within the Indian Child Welfare Act, including placement preferences.**

### **RPJC 69. Appointment, Appearance and Withdrawal of Counsel.**

RPJC 69 governs the procedure for the appointment, appearance and withdrawal of counsel. The determination of indigence mirrors language found in RPJC 38(B)(1) of the proposed dependency rules and reflects common practice.

### **RPJC 70. Appointment of Guardian ad Litem.**

RPJC 70 authorizes the appointment of a guardian ad litem in adoption proceedings and reflects common practice, particularly where the adoption is contested and the birth parent is a minor or is otherwise determined to be incompetent.

### **RPJC 71. Telephonic Testimony, Video Conferencing.**

RPJC 71 incorporates and expands upon language found in RPJC 19.2 and would authorize the use of video conferencing in addition to telephonic testimony and argument in adoption proceedings. Telephonic testimony is currently utilized in cases where the adoptive parent has filed a petition to adopt but subsequently moved out of state prior to the scheduled adoption hearing and cannot personally appear before the court.

### **RPJC 72. Computation of Time.**

RPJC 72 governs the computation of time and specifically incorporates the provisions of Rule 6, Ariz. R. Civ. P.

### **RPJC 73. Disclosure and Discovery.**

RPJC 73 seeks to provide guidance in the areas of discovery and disclosure and is reflective of common practice. RPJC 73(D) authorizes the use of civil discovery methods only upon the agreement of the parties or order of the court. Given the nature of juvenile proceedings, this rule seeks to balance the rights of the parties and prevent abuse of the process.

RPJC 69 governs the procedure for the appointment, appearance and withdrawal of counsel. The determination of indigence mirrors language found in RPJC 38(B)(1) of the proposed dependency rules and reflects common practice.

**RPJC 70. Appointment of Guardian ad Litem.**

RPJC 70 authorizes the appointment of a guardian ad litem in adoption proceedings and reflects common practice, particularly where the adoption is contested and the birth parent is a minor or is otherwise determined to be incompetent.

**RPJC 71. Telephonic Testimony, Video Conferencing.**

RPJC 71 incorporates and expands upon language found in RPJC 19.2 and would authorize the use of video conferencing in addition to telephonic testimony and argument in adoption proceedings. Telephonic testimony is currently utilized in cases where the adoptive parent has filed a petition to adopt but subsequently moved out of state prior to the scheduled adoption hearing and cannot personally appear before the court.

**RPJC 72. Computation of Time.**

RPJC 72 governs the computation of time and specifically incorporates the provisions of Rule 6, Ariz. R. Civ. P.

**RPJC 73. Disclosure and Discovery.**

RPJC 73 seeks to provide guidance in the areas of discovery and disclosure and is reflective of common practice. RPJC 73(D) authorizes the use of civil discovery methods only upon the agreement of the parties or order of the court. Given the nature of juvenile proceedings, this rule seeks to balance the rights of the parties and prevent abuse of the process.

#### **RPJC 74. Motions.**

RPJC 74 governs motion practice in adoption proceedings. RPJC 74(B) would permit service of a motion by fax or electronic means in addition to mail and hand delivery and reflects current practice. RPJC 74(C) sets forth response times and clarifies what constitutes completion of service for motions served by hand delivery, fax or electronic means. This rule permits the court to rule on motions before the response time has expired if the respondent's position is stated in the motion, reflecting current practice. As there are motions filed where there is no respondent, such as a request by the prospective adoptive parent to travel outside the country with the child, this rule permits the court to rule on such motions immediately. RPJC 74(E) specifically authorizes the filing of motions to set aside a judgment and differs from Rule 60(c), Ariz. R. Civ. P. by defining the "reasonable time" language in the civil rule to requiring filing within one year of the final order. RPJC 74(F) incorporates some of the language found in RPJC 17.1(a) and requires that the requesting party advise the court of any impending time limits.

#### **RPJC 75. Release of Information.**

RPJC 75 addresses the confidentiality of adoption proceedings as required by A.R.S. 8-120 and 8-121.

#### **RPJC 76. Service of Process.**

RPJC 76(A) requires that service of process be accomplished pursuant to Rules 4.1 and 4.2, Ariz. R. Civ. P and reflects current practice. **RPJC 76(B) outlines the notice requirements as set forth by the Indian Child Welfare Act.**

### **RPJC 77. Certification to Adopt.**

RPJC 77 outlines procedures for the implementation of A.R.S.8-105. RPJC 77(A) govern situations where the court does not have sufficient information to determine the applicant's acceptability to adopt within the sixty-day time frame as required by A.R.S. 8-105. Many times the applicant fails to provide required documentation to the agency conducting the certification study or there is a delay in the processing of fingerprints. This provision requires dismissal of the application if the statutory time frames cannot be met but does permit the court to consider information previously submitted if the applicant reappplies. RPJC 77(C) provides a mechanism for the applicant to request review of a denial, requires the court to set a hearing within sixty days and inform the applicant of the reasons for denial. Currently, persons seeking to be certified to adopt may or may not be told the reason for denial at the time of the certification hearing. RPJC 77(E) permits the applicant to review information which the court considered in making its determination. In order to foster open dialogue with the applicant's references, the committee determined that the content of those discussions should not be available to the applicant. References are currently told that information they provide will be maintained as confidential and there are sound public policy reasons for maintaining such confidentiality. RPJC 77(G) permits the court to consider all reliable evidence, which may include hearsay.

### **RPJC 78. Temporary Custody.**

RPJC 78 outlines procedures for the implementation of A.R.S. 8-108. RPJC 78(A) sets forth the contents of the petition and requires that the petitioner advise the court on the applicability of the Indian Child Welfare Act. RPJC 78(B)&(C) address attendance at the hearing and the manner of service. A.R.S. 8-108 requires that the hearing be held within ten days of the filing of the petition,

therefore traditional methods of service may not be practicable. RPJC 78(D)(2) provides that once temporary custody is granted, the petitioner has thirty days to file an application for certification. This provision is designed to eliminate those circumstances where a temporary custody order is granted, but the prospective adoptive parent fails to follow through with the certification process. **RPJC 78(E) requires that the court make findings, including whether the placement is in accordance with the Indian Child Welfare Act, if applicable.** RPJC 78(F) causes the temporary custody order to expire six months after issuance unless extended by the court after review. This provision is in response to concern expressed by committee members that temporary custody orders may not be adequately tracked to ensure children are not left indefinitely with families who are not certified to adopt.

#### **RPJC 79. Petition to Adopt.**

RPJC 79(A) requires that the petitioner advise the court, at the time of filing, whether there has been compliance with provisions of the Indian Child Welfare Act, whether all necessary consents have been obtained, whether parental rights have been terminated and whether there has been approval of the placement through Interstate Compact on the Placement of Children in the case of interstate adoptions. These are not statutorily mandated requirements but reflect information which is necessary to the court. RPJC 79(B)&(C) governs notice of the hearing and service of the petition.

#### **RPJC 80. Birth Parent Living Expenses.**

RPJC 80 outlines procedures for the implementation of A.R.S. 8-114.

### **RPJC 81. Consent to Adopt.**

RPJC 81 outlines procedures for the taking of consents to adopt from a birth parent where such consents must be taken before the court. This is usually required for purposes of an out-of-state adoption or where the consent is given as to an Indian child. **RPJC 81(C) sets forth the contents of a consent taken with regard to an Indian child. RPJC 81(D) requires that, with regard to an Indian child, the court must certify that the terms and conditions of the consents were fully explained to the parent or Indian custodian and that the parent or Indian custodian understood the meaning of the consents. RPJC 81(E) addresses consents which are invalid by virtue of being taken prior to time permitted by statute or the Indian Child Welfare Act, if applicable.**

### **RPJC 82. Petition and Hearing to Revoke Consent.**

RPJC 82 outlines procedures to be used in the event a birth parent wishes to withdraw their consent to the child's adoption, as permitted by A.R.S. 8-106(D). RPJC 82(A) requires the filing of a petition and notice of hearing. RPJC 82(C) outlines the parties to be served but does not require service upon the prospective adoptive parent if the original consent was given to an agency. It was the determination of the committee that the agency should notify the prospective adoptive parent in the event of a possible disruption of the adoption proceedings. RPJC 82(D) authorizes the appointment of counsel for a birth parent determined to be indigent. The appointment of counsel was deemed necessary in order to protect the rights of the birth parent and the prospective adoptive parents. RPJC 82(E) authorizes the appointment of a guardian ad litem on behalf of the child. A guardian ad litem should be appointed in those circumstances where the court believes there may be a valid basis for withdrawing the consent to adopt. The

court would then need to determine the status of the child and enter appropriate custody orders. RPJC 82(F) requires that the court schedule an initial hearing and order the parties to provide discovery prior to the evidentiary hearing. RPJC 82(G) requires that the court find by clear and convincing evidence that the consent was invalid and incorporates the burden of proof set forth in case law pertaining to Rule 60(c) motions to set aside final orders. In cases where an adoption is granted upon the consent of the parent, withdrawal of the consent is paramount to a request to set aside the adoption, therefore, the committee determined that the same burden of proof should apply. RPJC 82(I) requires the court to enter orders concerning custody of the child in the event the consents are set aside. **RPJC 82(J) addresses the revocation of consents by a parent or Indian custodian, as provided by the Indian Child Welfare Act.**

#### **RPJC 83. Documentation Required to Adopt.**

RPJC 83(A) sets forth all documents which the petitioner must file prior to the finalization of the adoption, incorporates statutory requirements and is reflective of current practice. The requirement that these documents be filed ten days prior to the hearing was created to ensure the court has all required information in order to avoid having to continue the hearing. RPJC 83(B) permits the petitioner to provide the certificate and order of adoption at the time of the hearing.

#### **RPJC 84. Hearing to Finalize Adoption.**

RPJC 84 outlines procedures for the implementation of A.R.S. 8-115. RPJC 84(A) permits the court to take testimony from a prospective adoptive parent unable to attend the hearing. This circumstance may arise where the adoptive parent is ill or has relocated out of state prior to the scheduling of the hearing. RPJC 84(B) incorporates the burden of proof required pursuant to A.R.S. 8-115(B). RPJC 84(C)(5) requires that the court enter formal orders terminating the

parental rights of the birth parent if parental rights had not been terminated in a prior proceeding. It was determined that courts differ in their practices regarding the formal termination of parental rights where the adoption is based upon the consent of the parent and this provision provides for uniformity among the courts. RPJC 84(C)(6) outlines determinations the court must make with regard to an Indian child before finalizing an adoption, **including a finding that the placement complies with the preferences set forth in the Act or there is good cause to deviate from the preferences. It also sets forth the burden of proof and findings the court must make when terminating parental rights.** RPJC 84(D) requires the court to enter orders and make findings pursuant to the Indian Child Welfare Act, if applicable. RPJC 84(D)(1) requires the dismissal of any dependency action upon the adoption of the child and is reflective of current practice.

#### **RPJC 85. Motion to Set Aside Adoption.**

RPJC 85 formalizes procedures for setting aside an adoption, making specific reference to Rule 60(c), Ariz.R.Civ.P. Although such motions have been uncommon in the past, new federal mandates to expedite adoptions, as set forth in the Adoptions and Safe Families Act, may result in an increase in such motions. RPJC 85(A) requires that only those grounds permitted by Rule 60(c) or the Indian Child Welfare Act may be cited as a basis for setting aside an adoption. This requirement is designed to prevent the filing of such motions where the grounds pursuant to Rule 60(c) do not exist, but the adoptive parent is no longer willing or able to care for the child. RPJC 85(B) permits the appointment of a guardian ad litem on behalf of the child. If it appears there are valid grounds upon which to set the adoption aside, the court must be in a position to enter appropriate orders concerning custody of the child. **RPJC 85(F) addresses grounds upon which a parent or Indian custodian may withdraw consent to an adoption after the adoption has**

**been finalized, as provided by the Indian Child Welfare Act.** RPJC 85(G) again requires that any findings or orders entered with regard to an Indian child be entered pursuant to the standards and burdens of proof as required by the Act.

#### **RPJC 86. Adoption Records.**

RPJC 86 outlines procedures for requesting adoption records from the court, as authorized by A.R.S. 8-121. RPJC 86 further provides guidance to the court concerning information to be released where the requestor is an Indian person who was the subject of an adoptive placement. The Indian Child Welfare Act specifically requires the release of certain types of information, therefore, the court must track such information and release it upon request.

#### **RPJC 87. Modification of Post Placement Agreements.**

RPJC 87 incorporates language found in A.R.S. 8-116.01, which was enacted in 1999. This statute allows for the parties to an adoption to enter into agreements concerning future contact between the child being adopted, the adoptive parent and the birth parent. The statute requires that the court approve all such agreements and retain jurisdiction to modify such agreements as may be in the best interests of the child.

It is recommended that proposed RPJC 1-8 appear as PART I. GENERAL PROVISIONS; RPJC 9-35 appear as PART II. DELINQUENCY AND INCORRIGIBILITY; RPJC 36-66 appear as PART III. DEPENDENCY, GUARDIANSHIP AND TERMINATION OF PARENTAL RIGHTS and RPJC 67-87 appear as PART IV. ADOPTION. It is further recommended that RPJC 24-29 be renumbered as RPJC 88-93 and appear as PART V. APPEALS.

### III. CONCLUSION.

Petitioner respectfully requests that the Supreme Court consider the original and amended petitions at its earliest convenience. Petitioner additionally requests that the amended petition be circulated for public comment and that the proposed amendments be adopted by the court as they currently appear or as later modified in light of comments received from the public. Adoption of a comprehensive set of procedural rules is imperative to the juvenile court in its attempts to implement numerous statutory changes which have been enacted in recent years. The proposed rules will provide uniformity and greatly assist the court in the efficient administration of justice.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2000.

A handwritten signature in cursive script, appearing to read "William O'Neil", is written over a horizontal line.

Committee on Juvenile Courts

By: William O'Neil, Chair

Presiding Juvenile Court Judge

Pinal County Superior Court

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## **APPENDIX A**

# **RULES OF PROCEDURE FOR THE JUVENILE COURT**

## **PART I. GENERAL PROVISIONS.**

### **RULE 1. Applicability; Definitions.**

- A. These rules govern the procedure for all matters in the juvenile court, including delinquency, incorrigibility, diversion, dependency, Title 8 guardianship, termination of parental rights and adoption.
- B. Reference made to a child, youth, minor or juvenile means a person under the age of eighteen (18) years.

### **RULE 2. Change of Judge or Commissioner.**

Any reference made to a "judge" shall also mean "commissioner."

- A. Change of Judge for Cause.
  - 1. Grounds. In any juvenile case prior to the commencement of a hearing, any party shall be entitled to a change of judge if a fair and impartial hearing cannot be had by reason of the interest or prejudice of the assigned judge.
  - 2. Procedure. Within five (5) days after discovery that grounds exist for change of judge, a party may file a motion verified by affidavit of the moving party, alleging specific grounds for the change. Copies shall be furnished to the parties and the presiding judge. No event occurring before the discovery shall constitute a waiver of the right to a change of judge for cause. Allegations of interest or prejudice which prevent a fair and impartial hearing may be preserved for appeal.
  - 3. Hearing. Promptly after the filing of the motion, the presiding judge shall set a hearing on the matter before a judge other than the judge being challenged. The hearing judge shall decide the issues by a preponderance of the evidence and following the hearing, shall return the matter to the presiding judge who shall as quickly as possible assign the action back to the original judge or make a new assignment, depending on the findings of the

hearing judge. If the named judge is the only judge in the county where the action is pending, that judge shall also perform the functions of the presiding judge. If the named judge is also the presiding judge, the functions of the presiding judge shall be performed by the judge designated by standing order of the presiding judge.

4. Waiver. A party loses the right to change of judge for cause when the party allows a proceeding to commence or continue without objection after learning of the cause for challenge.

**B. Change of Judge Upon Request.**

1. Grounds. Any party shall be entitled to request a change of judge as a matter of right.
2. Procedure. A party may exercise his or her right to a change of judge by making a request in open court on the record or by filing a pleading entitled "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A notice of change of judge shall be filed within five (5) days after notice to the requesting party of the assignment of the case to a judge. In the case of a reversal of a judgement or order by an appellate court, a notice of change of judge shall be filed within ten (10) days after the filing of the mandate from an appellate court with the clerk of the court.
3. Waiver. A party loses the right to a change of judge upon request when the party participates before that judge in any contested matter or hearing. Such waiver shall apply to all successive petitions or supplemental petitions filed with respect to the same juvenile or, in the case of a dependency action, the same minor or any other minor known to have at least one biological or adoptive parent in common with such minor, and to all proceedings after remand by an appellate court.

**C. Duty of Judge.** When a notice or an affidavit for change of judge is timely filed, the judge named in the notice or affidavit shall proceed no further in the action except to make such temporary orders as may be absolutely necessary to prevent harm to the child before the action can be transferred to another judge.

**D. Remand by Appellate Court.** When an action is remanded by an appellate court for a new hearing or proceeding, all rights to change of judge exist as set forth in this rule unless the matter is reassigned to the original judge.

**COMMITTEE COMMENT.**

It is the understanding of this committee that consideration is being given to limiting the circumstances under which a party is permitted to file a notice of change of judge to those cases where cause can be shown. If such changes are made to the civil and criminal rules of procedure, language appearing in Rule 2(B) should be stricken.

### **RULE 3. Appointment of Special Advocate.**

The court may appoint a volunteer special advocate in dependency, guardianship, termination, delinquency and incorrigibility actions, to assist and advocate for the child, to assure that all appropriate services are made available to the child and otherwise to protect the best interests of the child in the action.

### **RULE 4. Electronic Filing of Pleadings.**

The Clerk of the Superior Court, Juvenile Division may accept as filed any pleading transmitted electronically or by fax. The pleading filed in accordance with this rule shall be deemed filed from the time the document is electronically receipted by the clerk of the court. The original pleading shall be filed with the Clerk of the Superior Court within forty-eight (48) hours, excluding Saturdays, Sundays and holidays, of the electronically transmitted or faxed pleading. At the time of filing, copies of all pleadings shall be provided to the assigned judge or the court administrator if a judge has not been assigned.

### **RULE 5. Local Rules.**

The juvenile court of each county may make and amend rules governing its practice not inconsistent with these rules, subject to approval by the Supreme Court. In all cases not provided for by rules, the juvenile court may regulate its practice in any manner not inconsistent with these rules or local rules.

### **RULE 6. Formality of Proceedings.**

Proceedings as set forth in these rules, unless otherwise stated, shall be conducted as informally as the requirements of due process and fairness permit, and shall proceed in a manner similar to the trial of a civil action before the court sitting without a jury, except that the juvenile may not be compelled to be a witness in a delinquency or incorrigibility proceeding.

### **RULE 7. Priorities.**

Juvenile proceedings shall have priority over all other state court proceedings.

## **RULE 8. Applicability of the Indian Child Welfare Act.**

A. The Indian Child Welfare Act, 25 U.S.C. 1901 et seq., shall apply to non-criminal juvenile proceedings involving custody of an Indian child.

B. Incorporation. All provisions of the Indian Child Welfare Act shall be incorporated by reference, including any amendments to the Act.

C. Findings. The court shall make all findings pursuant to the standards and burdens of proof as required by the Indian Child Welfare Act.

### **COMMITTEE COMMENTS.**

**Because of the importance of the Indian Child Welfare Act and its applicability to state court proceedings, key provisions of the Act have been incorporated in these rules. However, not all provisions are set forth in these rules and the Act should be carefully reviewed, particularly as it relates to adoption proceedings. Any conflict between these rules and the Act shall be resolved in favor of the Act.**

## **Part II. DELINQUENCY AND INCORRIGIBILITY**

### **1. GENERAL DELINQUENCY PROVISIONS**

#### **RULE 9. Definitions.**

A. Parties. Reference to a party to the action may include the juvenile, parent, guardian, custodian, victim, state or any other person whose presence is required in the interests of justice.

B. Diversion/Diverted/ Deferred. Reference to diversion, diverted or deferred means the processing of a juvenile incorrigibility or delinquency matter which may obviate the need to adjudicate the juvenile.

#### **RULE 10. Appointment and Waiver of Counsel.**

A. Right to Counsel. The juvenile has the right to be represented by counsel in all delinquency and incorrigibility proceedings as provided by law. The court shall appoint counsel for the

juvenile if the juvenile is determined to be indigent. The court may appoint counsel for other parties determined to be indigent in the interests of justice, as provided by law.

**B. Determination of Indigence.**

1. Definition. The term indigent means a person not financially able to retain counsel.
2. Determination. The court shall order the juvenile, parent, guardian or custodian of the juvenile to provide proof of financial resources by filing a financial questionnaire provided by the court. The court may question the parent, guardian or custodian under oath. If the court determines the juvenile is entitled to appointed counsel, the parent, guardian or custodian may be ordered to pay a reasonable portion of the cost of counsel.

**C. Manner of Appointment.** If the court enters an order appointing or denying counsel, a copy of the order or minute entry shall be provided to the juvenile, parent, guardian or custodian, the attorney appointed and the prosecutor.

**D. Waiver of Counsel.** A juvenile may waive the right to counsel if the court finds that the waiver is knowingly, intelligently and voluntarily given in view of the juvenile's age, education and apparent maturity. The waiver of counsel should also be obtained in the presence of the parent, guardian or custodian in attendance on behalf of the juvenile. Waiver of counsel shall be set out in writing or in the minute entry of the court. If there is a conflict of interest between the juvenile and the parent, guardian or custodian, the court shall impose such safeguards on the waiver of counsel as appear in the best interests of the juvenile.

**RULE 11. Appearance of Counsel.**

**A. Appearance.** Counsel shall enter an initial appearance by appearing personally before the court and advising the court that counsel is representing a party or by filing a written notice of appearance with the clerk of the court and providing copies to the assigned judge and all parties.

**B. Withdrawal of Counsel.** Counsel shall represent the juvenile until the appeal time in any pending matter has expired and no hearings are scheduled, unless otherwise ordered by the court to continue representation. Upon the termination of representation, counsel may file a notice of withdrawal with the clerk of the court and provide copies to the assigned judge and all parties advising that no hearing is pending and the date the appeal time expired.

## **RULE 12. Attendance of Juvenile at Proceedings.**

A. Personal Appearance. A juvenile accused of committing a delinquent or incorrigible act shall appear before the court for all proceedings as directed by the court. The juvenile shall personally appear before the court for the following:

1. Any adjudication hearing;
2. Any disposition hearing;
3. Any transfer hearing; and
4. Any change of plea.

B. Telephonic or Video Appearance. For purposes of these rules, the appearance by telephone or video conferencing of the juvenile shall be considered a personal appearance. The juvenile may appear telephonically or by video conferencing only as authorized by the court.

C. Voluntary Absence. The court may infer that the juvenile's absence is voluntary if the juvenile had notice of the date, time and place of hearing, the right to be present at the hearing and had received a warning that the hearing would go forward in the juvenile's absence if the juvenile failed to appear.

D. Failure to Appear. The failure of the juvenile to appear at the adjudication or any other hearing shall not prevent the court from proceeding in the juvenile's absence or issuing a warrant to secure the juvenile's attendance.

## **RULE 13. Attendance of Witnesses and Counsel By Telephone or Video Conference.**

A. Adjudication Proceedings. Subject to the juvenile's constitutional right of confrontation, all parties and witnesses shall personally appear for adjudication proceedings unless otherwise authorized by the court.

B. Non-Adjudication Proceedings. Upon motion of either party, the court may permit testimony or argument or the appearance of counsel by telephone or video conferencing in any non-adjudicatory delinquency or incorrigibility proceeding. The motion shall be in writing, unless otherwise authorized by the court.

#### **RULE 14. Consolidation of Hearings.**

At any hearing other than with respect to transfer to another court, the court may hear all matters at one time: the advisory hearing, the detention hearing if necessary, the adjudication hearing, the disposition hearing or any combination of hearings.

#### **RULE 15. Motions.**

A. Form. All motions shall be in writing, unless otherwise authorized by the court, and shall set forth the basis for the relief sought.

B. Filing. All motions shall be filed with the clerk of the court and copies provided to the assigned judge at the time of filing. All parties and the assigned probation officer shall be served copies by mail, hand delivery, fax or by electronic means.

C. Motion to Continue. Any motion to continue shall advise the court of impending expiration of time limits and shall be granted only upon a showing that good cause exists and that delay is indispensable to the interests of justice. A continuance may be granted only for so long as is necessary to the interests of justice. **The court shall consider the victim's views and the victim's right to a timely adjudication of the juvenile in determining whether to grant a continuance. If a continuance is granted, the court shall state on the record the reason for the continuance.**

#### **RULE 16. Discovery.**

A. General Standards. The provisions governing discovery shall be subject to the following general provisions, except as provided by local rule:

1. Materials Not Subject to Disclosure. The following materials and information shall not be subject to disclosure:
  - a. Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel's legal or investigative staff; and
  - b. Informants. Disclosure of the existence or identity of an informant who will not be called to testify shall not be required where disclosure would result in substantial risk to the informant or to the informant's operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the juvenile.

2. Use of Materials. Any materials furnished to an attorney pursuant to this rule shall not be disclosed to the public but only to those necessary to the proper disposition of the case.
3. Statements. The term "statement" shall mean:
  - a. A writing signed or otherwise adopted or approved by a person;
  - b. A mechanical, electrical or other recording of a person's oral communications or a transcript thereof; and
  - c. A writing containing a verbatim record or a summary of a person's oral communications.
  - d. Superseded Notes: Handwritten notes which have been substantially incorporated into a statement shall no longer themselves be considered a statement.
4. Adjudication Hearing. Reference made to the adjudication hearing shall also mean the revocation of probation hearing, as well as the adjudication hearing.

B. Disclosure by the State.

1. Time Limits. Within ten (10) days of the advisory hearing, the prosecutor shall make available to the juvenile for examination and reproduction the following material and information within the prosecutor's possession or control:
  - a. The names and addresses of all persons whom the prosecutor will call as witnesses at the adjudication hearing together with their relevant written or recorded statements;
  - b. All statements of the juvenile and of any other juvenile for whom there is a companion adjudication hearing scheduled for the same time;
  - c. The names and addresses of experts who have personally examined the juvenile or any evidence in the particular case, together with the results of physical examinations and scientific tests, experiments or comparisons, including all written reports or statements made by an expert in connection with the particular case;
  - d. A list of all papers, documents, photographs or tangible objects which the prosecutor will use at the adjudication hearing, and upon further written request shall make available to the juvenile for examination, testing and reproduction any specified items contained in the list. The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section; and

- e. All material or information which tends to mitigate or negate the juvenile's alleged delinquent conduct.
- 2. **Prosecutor's Duty to Obtain Information.** The prosecutor's obligation under this rule extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case and who are under the prosecutor's control.
- 3. **Disclosure by Order of Court.** Upon motion of the juvenile and a showing that the juvenile has substantial need for additional material or information not otherwise covered in these rules, the court may order any person to make the material or information available to the juvenile if the juvenile is unable, without undue hardship, to obtain the material or information or substantial equivalent by other means. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

C. Disclosure by Juvenile.

- 1. **Physical Evidence.** The juvenile shall be entitled to the presence of counsel at the taking of evidence in connection with the allegations contained in the petition, as requested in writing by the prosecutor, at any time after the filing of the petition. This rule shall supplement and not limit any other procedures established by law. The juvenile shall:
  - a. Appear in a line-up;
  - b. Speak for identification by witnesses;
  - c. Be fingerprinted, palmprinted, footprinted or voiceprinted;
  - d. Pose for photographs not involving re-enactment of an event;
  - e. Try on clothing;
  - f. Permit the taking of samples of hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of the juvenile's body;
  - g. Provide handwriting samples; or
  - h. Submit to a reasonable physical or medical examination, provided such examination does not include a psychiatric or psychological examination.

2. Notice of Defenses/Witnesses. Within fifteen (15) days of the advisory hearing, the juvenile shall provide the prosecutor with written notice specifying all defenses which the juvenile will introduce at the hearing, including, but not limited to alibi, insanity, self-defense, entrapment, impotency, marriage, mistaken identity and good character. The notice shall specify for each defense the persons, including the juvenile, who will be called as witnesses at trial in support thereof. It may be signed by either the juvenile or the juvenile's counsel and shall be filed with the court.
3. Disclosures by Juvenile. Simultaneously with the filing of the notice of defenses/witnesses as required by this rule, the juvenile shall make available to the prosecutor for examination and reproduction:
  - a. The names and addresses of all persons, other than the juvenile, who will be called as witnesses at the adjudication hearing, together with all statements made by them in connection with the particular case;
  - b. The names and addresses of experts who will be called at the adjudication hearing, together with the results of physical examinations, scientific tests, experiments or comparisons, including all written reports and statements made by the expert in connection with the particular case; and
  - c. A list of all papers, documents, photographs, and other tangible objects which the juvenile will use at the adjudication hearing.
4. Additional Disclosure upon Request. The juvenile, upon written request, shall make available to the prosecutor for examination, testing, and reproduction any item listed pursuant to this rule.
5. Extent of Juvenile's Duty to Obtain Information. The juvenile's obligation under this rule extends to material and information within the possession or control of the juvenile, the juvenile's attorneys and agents.
6. Disclosure by Order of the Court. Upon motion of the prosecutor, and a showing that the prosecutor has substantial need for additional material or information not otherwise covered in these rules, the court may order any person to make the material or information available to the prosecutor if the prosecutor is unable, without undue hardship, to obtain the material or information or substantial equivalent by other means and that disclosure thereof will not violate the juvenile's constitutional rights. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

#### D. Excision and Protective Orders.

1. Discretion of the Court. Upon motion of any party and good cause shown, the court may order that the disclosure of the identity of any witness be deferred for any reasonable period of time not to extend beyond five (5) days prior to the date for adjudication, or that any other disclosures required by this rule be denied, deferred or regulated when it finds:
  - a. That the disclosure would result in a risk of harm outweighing any usefulness of the disclosure to any party; and
  - b. That the risk cannot be eliminated by a less substantial restriction of discovery rights.
2. Discretion of the Court to Authorize Excision. Upon motion of any party, if the court finds that only a portion of a document or other material is discoverable under these rules, it may authorize the disclosing party to excise that portion of the material which is not discoverable and disclose the remainder.
3. Excision and Protective Order Proceedings. Upon motion of the party seeking a protective or excision order, or requesting that the court determine whether material or information is discoverable, the court may permit that party to present the material or information for the inspection of the court without disclosure to the other parties. Counsel for all other parties shall be entitled to be present when such presentation is made.
4. Preservation of Record. If the court enters an order that any material, or any portion thereof, is not discoverable under this rule, the entire text of the material shall be sealed and preserved in the record to be made available to the appellate court in the event of an appeal.

E. Continuing Duty to Disclose. Each party has a continuing duty to disclose all information or materials which are subject to disclosure upon discovery of such information or materials. If additional information or materials are discovered, all parties shall be notified and disclosure shall be promptly made.

F. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

1. Ordering disclosure of the information not previously disclosed;
2. Granting a continuance;

3. Holding a witness, party, or counsel in contempt;
4. Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or
5. Declaring a mistrial when necessary to prevent a miscarriage of justice.

#### **RULE 17. Computation of Time.**

A. Excluded Time. The following periods shall be excluded from the computation of the time limits set forth in these rules:

1. Delays occasioned by or on behalf of the juvenile, including, but not limited to:
  - a. Delays caused by an examination and hearing to determine competency;
  - b. The juvenile's absence or incompetence;
  - c. The reasonable time allowed, not to exceed thirty (30) days, for the parties to prepare for a hearing after the juvenile's warrant hearing or restoration to competency; or
  - d. The juvenile's inability to be arrested, cited or detained in Arizona.
2. Delays necessitated by congestion of the court's calendar, but only when the congestion is attributable to extraordinary circumstances, in which case the Presiding Juvenile Judge shall promptly apply to the Chief Justice of the Arizona Supreme Court for suspension of any of the Rules of Procedure for the Juvenile Court;
3. Delays resulting from continuances granted as set forth in Rule 15(C); or
4. Delays resulting from the juvenile being referred to a diversion or community based alternative program.

#### **RULE 18. Duties of Counsel/ Speedy Justice.**

A. Duty of Prosecutor. The prosecutor shall advise the court of facts relevant to determining the order of cases on the calendar.

B. Duty of Defense Counsel. The juvenile's counsel shall advise the court of the impending expiration of time limits in the juvenile's case. Failure to do so should be considered by the court in determining whether to dismiss a petition with prejudice.

C. Motion to Dismiss. Upon motion of the juvenile, filed pursuant to Rule 15, or upon the court's own motion, the court may set a hearing to determine whether the time limits set forth in these rules, after subtracting any periods excluded pursuant to Rule 17, have been violated. If the motion to dismiss is granted, the court shall dismiss the petition without prejudice unless the court finds that the interests of justice require that the dismissal be with prejudice.

## **RULE 19. Records and Proceedings.**

### **A. Contents of Juvenile Court Files.**

1. Legal File. The legal file of the juvenile court shall consist of all pleadings, motions, minute entries, orders, or other documents as the court may order. The legal file shall be open to public inspection without order of the court, except upon a finding by the court of a need to protect **the welfare of the victim, another** party or a clear public interest in confidentiality. The court shall state its reasons for withholding the legal file, or portions thereof, from public inspection.
2. Social File. The social file may consist of all social records, including diagnostic evaluations, psychiatric and psychological reports, treatment records, medical reports, social studies, child protective services records, predisposition reports, detention records, and records and reports or work product of the probation department for use by the court in formulating and implementing a rehabilitation plan for the juvenile and his or her family. The social file of the juvenile shall be confidential and withheld from public inspection except upon order of the court.

B. Proceedings. Delinquency, incorrigibility, diversion involving delinquent acts and transfer proceedings shall be open to the public, except upon the court's written finding of a need to protect the best interests of a victim, the juvenile, a witness, the state, or a clear public interest in confidentiality.

1. Request to Close Hearing. Any person requesting that a hearing or portion thereof be closed to the public shall give notice of such request to all persons or entities which have filed an appearance in the case, or to one or more media representatives designated by the court, to the juvenile, parent, guardian, or custodian of the juvenile and to any person who is designated by the court as a party. The court shall hold a hearing, prior to the

proceeding, to determine whether the proceeding should be closed and shall consider the positions of the parties. In determining whether to close a hearing or any portion thereof, the judge may consider any relevant factors, including the likelihood that an open hearing may:

- a. Be emotionally harmful to a participant, or
- b. Inhibit testimony or the disclosure or discussion of information material to the truth-finding or rehabilitation process, or
- c. **Otherwise interfere with the emotional well-being of the victim.**

## **RULE 20. Intercounty Transfers.**

### **A. Eligibility.**

- 1. The court may authorize the transfer of a disposition hearing to the county of the juvenile's residence upon agreement of the parties, which shall include the court of the receiving county. This agreement shall ensure that the victim of the offense has had the opportunity to be heard, declines to be present at the hearing and agrees to the transfer.
- 2. The court may authorize the transfer of a case from the county of disposition to the county of residence under probation supervision in accordance with this rule.

### **B. Transfer of Disposition Hearing.**

- 1. The clerk of the court in the county of original jurisdiction shall forward a certified copy of the legal file, together with a transmittal letter, to the clerk of the court in the receiving county within ten (10) days. Upon receipt, the transmittal letter shall be signed by clerk of the court in the receiving county and returned to the clerk of the court in the county of original jurisdiction.
- 2. Upon agreement of all parties to the transfer of a case for disposition, the county probation department transferring the case shall send copies of the social file and any other pertinent information to the director of court services in the receiving county at least fourteen (14) days prior to the disposition hearing.

### C. Courtesy Probation Supervision.

1. The court may authorize a juvenile placed on probation to reside in another county upon verification that the court in the receiving county can provide courtesy probation supervision in accordance with the terms and conditions originally imposed upon the juvenile.
2. If the receiving county is unable to ensure that the terms and conditions of probation can be supervised as ordered, the court in the sending county may, after a hearing, amend the terms and conditions of probation to permit transfer.
3. The court in the sending county shall retain jurisdiction over the juvenile and shall be responsible for the collection of fees, restitution and any violations of probation.

### D. Transfer of Probation.

1. If the juvenile is expected to continue to reside outside the county of original jurisdiction for more than one hundred and twenty (120) days, the court may order a transfer of probation supervision to the county in which the juvenile and parent, guardian or legal custodian reside.
2. The clerk of the court in the county of original jurisdiction shall forward a certified copy of the legal file, together with a transmittal letter, to the clerk of the court in the receiving county within ten (10) days. Upon receipt, the transmittal letter shall be signed by the clerk of the court in the receiving county and returned to the clerk of the court in the county of original jurisdiction.
3. The county probation department transferring the case shall send copies of the social file and any other pertinent information to the director of court services in the receiving county for processing.
4. The juvenile probation officer shall request that the court conduct a review hearing to affirm and/or modify the terms and conditions of supervision to include the payment of fees and restitution. Upon granting a transfer of probation supervision, the court of the receiving county shall assume jurisdiction of the case.

### E. Residential Placements. This rule does not apply to out-of-county residential placements.

## **RULE 21. Rights of Victims.**

The rights afforded victims, as set forth in these rules or as otherwise provided by law, shall apply to those offenses committed by a juvenile which, if committed by an adult would be a misdemeanor involving physical injury, the threat of physical injury, a sexual offense or would be a felony offense. The victim has the right to be present at all proceedings where the juvenile has the right to be present. The court shall ensure that the rights of victims, including those rights not specifically set forth in these rules, be enforced in a manner consistent with the protection and rehabilitation of the victim.

### **COMMITTEE COMMENT.**

All of the specific rights afforded victims are set forth in statute and should be reviewed carefully. Due to the importance of victims' rights, many of those rights have been incorporated into these rules in order to ensure compliance with statutory mandates. Nothing in these rules should be interpreted in a manner which would, in any way, circumvent or otherwise interfere with those statutory rights.

## **2. DELINQUENCY AND INCORRIGIBILITY PROCEEDINGS.**

### **RULE 22. Pre-Petition Investigation and Diversion.**

A. Referral. Any referral of incorrigible or delinquent conduct filed by an individual or agency shall be in writing, signed by the person responsible for the filing and shall set forth the following:

1. The facts, in concise language with reasonable particularity as to the time, date, place and manner of the alleged acts of the juvenile and the law or standard of conduct allegedly violated by such acts, which bring the juvenile within the jurisdiction of the court;
2. The name, age, gender and address of the juvenile named in the referral;
3. The names and addresses, if known, of the parent, guardian or custodian of the juvenile or of the juvenile's spouse, if any; and
4. If the juvenile is in custody, the place of detention and the date and time the juvenile was taken into custody.

B. Record of Referral. An authorized juvenile court officer who receives a referral shall make a record of the referral in the manner prescribed by the juvenile court in each county.

C. Diversion or Deferral. The prosecutor shall have sole discretion to divert or defer the prosecution of a juvenile accused of an incorrigible or a delinquent act to a community based alternative program or to a diversion program administered by the juvenile court. **If the juvenile is accepted into a diversion program, the court administering the program shall notify the victim, as provided by law.**

D. Submission. After reviewing a referral, the authorized juvenile court officer shall submit the referral to the prosecutor if the offense has not been designated for diversion.

### **RULE 23. Detention and Probable Cause Hearing.**

A. Report To Court. Except for an arrest pursuant to a warrant, any person who brings a juvenile to a juvenile court detention facility shall make a report to the authorized juvenile court officer in the manner prescribed by the juvenile court in each county setting forth the reasons why the juvenile should be detained.

B. Admission to Detention. Upon admission to the detention facility, the authorized juvenile court officer shall:

1. Notify the juvenile of the reason for admission;
2. Notify the parent, guardian or custodian of the juvenile of the reason for admission and inform such persons of the location, date and time of the detention hearing. The detention hearing may be held without the presence of the juvenile's parent, guardian or custodian, if they cannot be located or fail to appear for the hearing;
3. Make a written record of the time and manner of notification;
4. Make a determination of whether the juvenile's conduct endangers or could endanger the safety of other detained juveniles and if so, restrict the juvenile's contact with other detained juveniles;
5. Advise the juvenile of the right to telephone a parent, guardian or custodian and counsel immediately after admission to a detention facility; and

6. Advise the juvenile of the right to visitation, in private, by the parent, guardian or custodian and counsel. After the initial visit, the juvenile may be visited during normal visiting hours or by special appointment if required to prepare for a hearing.

C. Length of Detention. No juvenile shall be held in detention for more than twenty-four (24) hours without a probable cause hearing. If a probable cause hearing is not held within twenty-four (24) hours of the time of the initial detention of the juvenile, the juvenile shall be released from the detention facility to a parent, guardian, custodian or other responsible person. If no parent, guardian, custodian or other responsible person can be located, the court shall release the juvenile to the Department of Economic Security.

D. Probable Cause Hearing. Probable cause may be based upon the allegations in a petition, complaint or charging document filed by a law enforcement official, along with a properly executed affidavit or sworn testimony. If the charging document is an Arizona Ticket and Complaint form, the complaint shall also serve as an affidavit. The affidavit may serve as the oath before a magistrate for purposes of Rule 2.4, Ariz. R. Crim. P. **The victim of the offense has the right to be heard at the detention hearing, as provided by law.** A juvenile shall be detained only if there is probable cause to believe that the juvenile committed the acts alleged in the referral, petition, or complaint, and there is probable cause to believe:

1. The juvenile otherwise will not be present at any hearing; or
2. The juvenile is likely to commit an offense injurious to self or others; or
3. The juvenile must be held for another jurisdiction; or
4. The interests of the juvenile or the public require custodial protection; or
5. The juvenile must be held pending the filing of a complaint pursuant to A.R.S. 13-501.

E. Release From Detention. The court may release the juvenile and set such terms and conditions of release as deemed appropriate. Upon release from any detention facility, the court shall advise the juvenile that any violation of release conditions or the failure to appear at future proceedings could result in the issuance of a warrant for the arrest and detention of the juvenile and that the court may proceed with future hearings in the juvenile's absence. **Upon request of the victim, the court shall provide the victim with a copy of the terms and conditions of the juvenile's release, as provided by law.**

F. Violation of Conditions of Release. The juvenile probation officer responsible for supervising the juvenile or the prosecutor may file a written request with the court to revoke the juvenile's release if there is probable cause to believe the juvenile has violated a condition of release. The request shall state the substance of the conduct which is alleged to have violated the conditions of release previously imposed. The court shall proceed in accordance with the requirements of this rule. **If the probation officer or prosecutor does not file a motion to revoke release, nothing shall preclude the victim from filing the motion, as provided by law.**

G. Release to County Jail. Upon the filing of a criminal complaint charging a juvenile with an offense listed in A.R.S. 13-501, the juvenile may be released from the juvenile detention facility to the county jail. The filing of a criminal complaint shall be the date of arrest for purposes of Rules 4 & 8.2, Ariz. R. Crim. P.

H. Review of Detention. The court may review the detention status of a juvenile upon written motion of the juvenile, the prosecutor or upon the court's own motion. The motion must allege material facts not previously presented to the court. A hearing on the motion to review detention status shall be held within five (5) days of the filing of the motion. **The victim has the right to be heard concerning the release of the juvenile and the conditions of release, as provided by law.** Acceleration of the motion may be granted upon written request demonstrating extraordinary circumstances and that the acceleration is necessary in the interests of justice.

## **RULE 24. Content of Petition.**

A. Content. A petition alleging delinquent or incorrigible acts shall be in writing, under oath, captioned: "In the Matter of \_\_\_\_, a person under the age of 18 years," and may be upon information and belief and filed by the prosecutor. It shall set forth:

1. The facts, in concise language with reasonable particularity as to the time, date, place and manner of the alleged acts of the juvenile and the law or standard of conduct allegedly violated by such acts, which bring the juvenile within the jurisdiction of the court;
2. The name, age, gender and address of the juvenile named in the petition;
3. The names and addresses, if known, of the parent, guardian or custodian of the juvenile or of the juvenile's spouse, if any; and
4. The place of detention and the date and time the juvenile was taken into custody, if the juvenile in custody.

B. Amendment to Petition. A petition may be amended by order of the court in response to the motion of any party at any time before adjudication, provided the parties are granted sufficient time to meet the new allegations. A copy of the motion shall be provided to the parties pursuant to Rule 15.

## **RULE 25. Filing of a Petition.**

A. Filing. All petitions alleging delinquent or incorrigible acts shall be filed with the clerk of the court.

B. Time Limits. Petitions shall be filed within the following time limits:

1. Detained Juvenile. If the juvenile is detained, the petition shall be filed within twenty-four (24) hours of the initial detention, excluding holidays and weekends.
2. Juvenile Not Detained. If the juvenile is not detained, the petition shall be filed within thirty (30) days of submission of the referral to the prosecutor. The time for filing a petition is extended for an additional thirty (30) days pending further investigation by the prosecutor. No more than one thirty (30) day extension of time for further investigation shall be allowed except upon order of the court for good cause shown.

C. Diversion. If a referral is sent to a diversion program administered by the juvenile court or prosecutor or to a community based alternative program, the time limit for filing a petition shall be tolled during the period required to comply with the terms of diversion. If the juvenile is deemed ineligible for diversion, a petition shall be filed not later than thirty (30) days after the matter is resubmitted to the prosecutor for action.

## **RULE 26. Service of Petition and Notice to Appear.**

A. Notice to Appear. After the petition alleging an incorrigible or delinquent act has been filed, the juvenile and the parent, guardian or custodian shall be notified in writing to appear before the court. The notice shall compel the attendance of the juvenile and the parent, guardian or custodian or other persons having custody of the juvenile. The notice to appear shall:

1. Contain the name and address of the person to whom the notice is directed;
2. Contain the location, date and time of the hearing on the petition;

3. Contain the name of the juvenile involved in the offense alleged in the petition; and
4. Advise the person to whom the notice is directed that failure to appear will result in sanctions being entered against the person, which may include being held in contempt.

B. Service. The petition and notice to appear shall be served upon the following persons; the parent, guardian, custodian and juvenile if the juvenile is fourteen (14) years of age or older and upon counsel representing any party. Each party shall be personally served by an authorized juvenile court officer or an officer authorized to serve process in a civil action except as otherwise provided. If the court finds that it is impracticable to personally serve the parties, it may approve service by certified or registered mail, return receipt requested. Return of the receipt or an affidavit of service shall be prima facie evidence of service.

C. Contempt. The court may set a hearing on an order to show cause for contempt against any person who fails to appear after being served with a notice to appear unless reasonable cause for the non-appearance is presented to the court. The order to show cause shall be served upon the parties pursuant to this rule. Whenever it appears by affidavit or testimony that the person to be served with a notice to appear cannot be found, his address cannot be ascertained after reasonable efforts have been made to locate the person or the person will not otherwise appear, the court may issue a warrant to secure that person's appearance. The failure of a parent, guardian or custodian to appear shall not prevent the court from proceeding.

D. Warrants. The court may compel the attendance of the juvenile by issuing a warrant for the juvenile's arrest, for good cause and in the interest of justice, if it appears the juvenile's failure to appear was willful.

## **RULE 27. Subpoenas.**

A. Subpoenas. Subpoenas and other process to compel the attendance of witnesses may be issued by the clerk of the court or prosecutor who will present evidence at any hearing involving a juvenile accused of committing a delinquent or incorrigible act. The subpoena shall advise the person to be served of the location, date and time of the hearing and that failure to appear will result in sanctions being entered against the person, which may include being held in contempt.

B. Service. Any person may serve a subpoena to compel the attendance of a witness at any hearing involving a juvenile. The witness shall be personally served. If the court finds that it is impracticable to personally serve the witness, it may approve service by certified or registered mail, return receipt requested. Return of the receipt or an affidavit of service shall be prima facie evidence of service.

C. Contempt. The court may set a hearing on an order to show cause for contempt against any person who fails to appear after being served with a subpoena unless reasonable cause for the non-appearance is presented to the court. The order to show cause shall be served upon the parties pursuant to this rule. Whenever it appears by affidavit or testimony that the person to be served with a subpoena cannot be found, his address cannot be ascertained or the person will not otherwise appear, the court may issue a warrant to secure that person's appearance.

## **RULE 28. Advisory Hearing.**

A. Purpose. After the filing of a petition alleging delinquent or incorrigible acts, the court shall set an advisory hearing for the purpose of advising the juvenile, parent, guardian or custodian of the allegations against the juvenile as set forth in the petition and determining whether the juvenile admits or denies the allegations. Copies of the petition shall be given to the juvenile, parent, guardian or custodian and counsel representing any party unless the parties were served notice pursuant to Rule 26.

B. Time Limits.

1. Detained Juvenile. If the juvenile is detained, the advisory hearing shall be held within twenty-four (24) hours of the filing of the petition.
2. Juvenile Not Detained. If the juvenile is not detained, the hearing shall take place within thirty (30) days of the filing of the petition.

C. Procedure. At the advisory hearing the court shall:

1. Advise the juvenile, parent, guardian or custodian of the right of the juvenile to be represented by counsel, including the right to be appointed counsel if the juvenile is indigent, as provided by law;
2. Advise the parties of the juvenile's right to remain silent throughout the proceeding;
3. Advise the parties of the juvenile's right to call witnesses on the juvenile's behalf;
4. Advise the parties of the right to confront witnesses presented by the state;
5. Determine whether the juvenile understands the constitutional rights set forth by the court and whether the juvenile knowingly, intelligently and voluntarily wishes to waive those rights;

6. **Determine whether the victim of the offense has requested to be present and be heard if a plea agreement is to be presented to the court. The court shall not accept a plea agreement unless :**
  - a. **The prosecutor advises the court that reasonable efforts were made to confer with the victim concerning the proposed plea;**
  - b. **Reasonable efforts were made to advise the victim of the plea proceeding and of the victim's right to be present and to be heard; and**
  - c. **The prosecutor advises the court that to the best of the prosecutor's knowledge the notice requirements were complied with and the prosecutor advises the court of the victim's position, if known, regarding the proposed plea agreement.**
7. Determine whether the juvenile wishes to admit or deny the allegations;
  - a. Admission. If the juvenile wishes to admit to allegations, the court shall accept the admission or plea if supported by a factual basis and a finding that the juvenile knowingly, intelligently and voluntarily waives the rights enumerated above. The factual basis may include evidence other than the statements of the juvenile.
  - b. Denial. If the juvenile denies the allegations in the petition, the court shall set an adjudication hearing as required by these rules.
8. Set conditions of release, if any, and advise the juvenile that any violation of the terms and conditions of release may result in the issuance of a warrant for the arrest and detention of the juvenile.

D. Findings and Orders. At the conclusion of the hearing, the court shall make its findings in writing, in the form of a minute entry or order. If the juvenile admits the allegations in the petition, the court must find there was a valid waiver of constitutional rights and that a factual basis in support of the admission exists.

E. Disposition. Following a finding of delinquency or incorrigibility, the court shall adjudicate the juvenile delinquent or incorrigible and proceed with a disposition hearing or defer acceptance of the plea. The juvenile shall be subject to orders of the court under the supervision of a probation officer pending the adjudication or disposition hearing.

## **RULE 29. Adjudication Hearing.**

A. Purpose. The court shall conduct an adjudication hearing for purposes of determining whether the juvenile committed the acts alleged in the delinquency or incorrigibility petition.

B. Time Limits.

1. Detained Juvenile. An adjudication hearing for a detained juvenile shall take place within thirty (30) days of the date of the advisory hearing unless a motion for transfer or petition to revoke probation has been filed.
2. Juvenile Not Detained. If the juvenile is not detained, an adjudication hearing shall take place within sixty (60) days of the date of the advisory hearing unless a motion for transfer or petition to revoke probation has been filed.
3. Reversal of Judgement. An adjudication hearing ordered upon the reversal of a judgment or order by an appellate court shall take place within sixty (60) days of the date of entry of the order of the court or service of the mandate of the appellate court.

C. Burden of Proof. The state must prove the allegations alleged in the petition beyond a reasonable doubt.

D. Procedure. The presentation of evidence at the adjudication hearing shall be as informal as the requirements of due process and fairness permit, and shall proceed generally in a manner similar to the trial of a civil action before the court sitting without a jury, except that the juvenile may not be compelled to be a witness.

1. Amendment to Conform to Evidence. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the juvenile consents to the amendment. The charging document shall be deemed amended to conform to the evidence presented at any court proceeding.
2. Judgment of Acquittal. On motion of the juvenile or the court's own motion, the court shall enter a judgment of acquittal on one or more offenses alleged in the petition after the close of the evidence on either side if there is no substantial evidence to support an adjudication.

E. Findings and Orders. At the conclusion of the hearing, the court shall make one of the following findings in writing in the form of a minute entry or order:

1. That the facts alleged in the petition were proven beyond a reasonable doubt and the juvenile is adjudicated delinquent or incorrigible; or
2. That the facts alleged in the petition were not proven beyond a reasonable doubt and the petition is dismissed.

F. Disposition. Following a finding of delinquency or incorrigibility, the juvenile shall be subject to orders of the court under the supervision of a probation officer pending the disposition hearing.

#### **COMMITTEE COMMENT.**

Reference to the admissibility of statements by a juvenile has been omitted from these rules because the majority of the committee believed the issue had been adequately addressed in case law. In no way should this omission be interpreted as lessening the rights afforded the juvenile as previously set forth in Rule 7 of the Rules of Procedure for the Juvenile Court.

#### **RULE 30. Disposition.**

A. Dispositional Investigation and Report. Prior to the disposition hearing, the court shall order the juvenile probation officer to conduct an investigation and submit a written report to the court with recommendations regarding the disposition of the juvenile.

1. The disposition report shall:
  - a. Be submitted to the court three (3) days prior to the disposition hearing;
  - b. Be made available three (3) days prior to the hearing to counsel for the parties or to the parties if unrepresented by counsel;
  - c. Include a written victim impact statement as required by law;
  - d. Provide the court with information regarding restitution if restitution is requested; and
  - e. Make recommendations as to the most appropriate disposition for the juvenile.
2. **Availability of Report to Victim. On request, the court shall provide the victim with the following information contained in the disposition report:**
  - a. **The referral history of the juvenile;**

- b. **The probation officer's assessment of the case;**
  - c. **The disposition and treatment recommendations;**
  - d. **The probation officer's recommendations for treatment and disposition; and**
  - e. **The detention history of the juvenile.**
- 3. Waiver of Report. Upon stipulation of the parties and order of the court, the disposition report may be waived if the victim did not provide a written impact statement as provided by law.
  - 4. Evaluation of Juvenile. Prior to the disposition hearing, the court may order that the juvenile submit to a physical, psychiatric and/or psychological evaluation as part of the investigation.
  - 5. Release of Information. Material psychologically damaging to any of the parties or destructive of the relationships between members of the family concerned may, in the discretion of the court, be withheld from any of the parties in question.

B. Disposition Hearing.

- 1. Time Limits.
  - a. Detained Juvenile. If the juvenile is detained, the hearing shall be held within thirty (30) days of adjudication of delinquency or incorrigibility.
  - b. Juvenile Not Detained. If the juvenile is not detained, the hearing shall be held within forty-five (45) days of adjudication of delinquency or incorrigibility.
  - c. Continuance. Disposition may be deferred or continued on motion of counsel, or on the court's own motion for good cause. If the juvenile is detained, the disposition may not be deferred for more than thirty (30) days after the date initially set for disposition without the juvenile's consent given in open court.
- 2. Procedure. When the court makes a finding that a juvenile is delinquent or incorrigible, the court shall make a disposition of the matter as provided by law or set the matter for a disposition hearing. The court may assign the matter to another judge or juvenile hearing officer. **The victim has the right to be present and address the court at any disposition hearing, as provided by law.**

3. Findings and Orders. At the close of the disposition hearing, the court shall make findings in writing in the form of a minute entry or order. If the disposition is probation, the order shall set forth the conditions of probation.
4. Right to Appeal. Following the entry of an order by the court, the court shall explain to the juvenile the right to appeal and shall set forth the method of appeal.

### **RULE 31. Probation.**

A. Imposition of Probation. The court may place a juvenile on probation at the time of disposition. The court shall impose on the juvenile conditions of probation that will promote rehabilitation and public safety. In addition, the assigned juvenile probation officer may impose regulations which are consistent with and necessary to the implementation of the conditions imposed by the court.

B. Notice. Written notice of all conditions and regulations shall be given to the juvenile, unless exigent circumstances require oral notice directly by the juvenile probation officer to the juvenile. When oral notice is given, written notice shall be given promptly to the juvenile confirming the oral notice.

C. Modification of Probation. The juvenile probation officer may modify or clarify any regulation which the probation officer has imposed. The court may modify any condition which it has imposed and any regulation imposed by a probation officer after notice has been provided to the prosecutor and the juvenile. The juvenile, juvenile probation officer or the state may ask the court to modify or clarify any condition or regulation. The court may hold a hearing at the request of any party. **On request of the victim, the court shall notify the victim of any proposed modification of the terms of probation if the modification will substantially affect the juvenile's contact with or the safety of the victim or if the modification affects restitution or incarceration of the juvenile. The court shall afford the victim an opportunity to be heard, as provided by law.** A written copy of a modification or clarification shall be given to the juvenile.

D. Termination of Probation. The court may terminate the probation of the juvenile at any time prior to the eighteenth (18) birthday of the juvenile upon the request of the juvenile probation officer, motion of the juvenile, or its own motion after notice and opportunity for response from all parties. **On request of the victim, the court shall notify the victim of any proceeding in which the court is asked to terminate the juvenile's probation and shall afford the victim an opportunity to be heard, as provided by law.**

## **RULE 32. Revocation of Probation.**

A. Initiation. The juvenile probation officer responsible for supervising the juvenile or the prosecutor may petition the court to revoke probation if there is probable cause to believe that the juvenile has violated a condition or regulation of probation. The prosecutor shall represent the state in any revocation of probation proceeding. **On request of the victim, the court shall notify the victim of any probation revocation disposition proceeding and shall afford the victim the opportunity to be heard, as provided by law.**

B. Petition. The petition shall be entitled "Petition to Revoke Probation," shall state the substance of the conduct which is alleged to have violated the conditions or regulations previously imposed and in all other respects shall conform to Rule 24(A).

1. Notice to Appear. After the petition to revoke probation act has been filed, the juvenile and the parent, guardian or custodian shall be notified in writing to appear before the court. The notice shall compel the attendance of the juvenile and the parent, guardian or custodian or other persons having custody of the juvenile. The notice to appear shall:
  - a. Contain the name and address of the person to whom the notice is directed;
  - b. Contain the location, date and time of hearing on the petition;
  - c. Contain the name of the juvenile involved in the allegation alleged in the petition; and
  - d. Advise the person to whom the notice is directed that failure to appear will result in sanctions being entered against the person, which may include being held in contempt.
2. Service. The notice and a copy of the petition shall be served upon the following persons; the parent, guardian, custodian and juvenile if the juvenile is fourteen (14) years of age or older and upon counsel representing any party. Each party shall be personally served by an authorized juvenile court officer or an officer authorized to serve process in a civil action except as otherwise provided. If the court finds that it is impracticable to personally serve the parties, it may approve service by certified or registered mail, return receipt requested. Return of the receipt or an affidavit of service shall be prima facie evidence of service.
3. Contempt. The court may set a hearing on an order to show cause for contempt against any person who fails to appear after being served with a notice to appear unless reasonable cause for the non-appearance is presented to the court. The order to show

cause shall be served upon the parties pursuant to this rule. Whenever it appears by affidavit or testimony that the person to be served with a notice to appear cannot be found, his address cannot be ascertained after reasonable efforts have been made to locate the person or the person will not otherwise appear, the court may issue a warrant to secure that person's appearance. The failure of a parent, guardian or custodian to appear shall not prevent the court from proceeding.

4. Amendment to the Petition. A petition may be amended by order of the court in response to the motion of any interested party at any time before an adjudication, provided the parties are notified and granted sufficient time to meet the new allegations. A copy of the motion shall be provided to the parties pursuant to Rule 15.

C. Probable Cause Determination. At or after the time a petition to revoke probation is filed, the court shall determine whether there is probable cause to believe that a condition or regulation of probation has been violated by the juvenile, based upon the allegations set forth in the petition. The court shall set the matter for an advisory hearing.

D. Advisory Hearing. The court shall inform the juvenile of the allegations in the petition to revoke probation and shall ask the juvenile to admit or deny each allegation contained in the petition to revoke probation.

1. Time Limits.

- a. If the juvenile is in custody on a petition to revoke probation, an advisory hearing shall be held within twenty-four (24) hours of the initial detention.
- b. If the juvenile is not in custody, the advisory hearing shall be held within fourteen (14) days after the service of the petition and notice to appear.

2. Procedure. At the advisory hearing the court shall:

- a. Advise the juvenile, parent, guardian or custodian of the right of the juvenile to be represented by counsel, including the right to be appointed counsel if the juvenile is indigent, as provided by law;
- b. Advise the parties of the juvenile's right to remain silent throughout the proceeding;
- c. Advise the parties of the juvenile's right to call witnesses on the juvenile's behalf;
- d. Advise the parties of the right to confront witnesses presented by the state;

- e. Determine whether the juvenile understands the constitutional rights set forth by the court and whether the juvenile knowingly, intelligently and voluntarily wishes to waive those rights;
- f. **Determine whether the victim of the offense has requested to be present and be heard if a plea agreement is to be presented to the court. The court shall not accept a plea agreement unless :**
  - i. **The prosecutor advises the court that reasonable efforts were made to confer with the victim concerning the proposed plea;**
  - ii. **Reasonable efforts were made to advise the victim of the plea proceeding and of the victim's right to be present and to be heard; and**
  - iii. **The prosecutor advises the court that to the best of the prosecutor's knowledge the notice requirements were complied with and the prosecutor advises the court of the victim's position, if known, regarding the proposed plea agreement.**
- g. Determine whether the juvenile wishes to admit or deny the allegations.
  - i. Admission. If the juvenile wishes to admit to allegations, the court shall accept the admission or plea if supported by a factual basis and a finding that the juvenile knowingly, intelligently and voluntarily waives the rights enumerated above. The factual basis may include evidence other than the statements of the juvenile.
  - ii Denial. If the juvenile denies the allegations in the petition, the court shall set an adjudication hearing as required by these rules.

- 3. Statements at Revocation Proceeding. The court shall advise the juvenile that if the alleged violation involves a delinquent or incorrigible act for which the juvenile has not yet been adjudicated, regardless of the outcome of the probation revocation proceeding, the juvenile may still be adjudicated for the alleged offense and any statement made by the juvenile at the probation revocation proceeding may be used against the juvenile at the adjudication hearing.

E. Probation Violation Hearing.

- 1. Time Limits. The probation violation hearing shall be held within twenty-one (21) days of the advisory hearing unless the court, upon written motion of the juvenile, finds good cause to continue the hearing to a later date.

2. Burden of Proof. A violation of probation must be established by a preponderance of the evidence.
3. Procedure. Each party may present evidence and shall have the right to cross-examine witnesses who testify. The court may admit any reliable evidence not legally privileged, which may include hearsay.
  - a. Amendment to Conform to Evidence. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the juvenile consents to the amendment. The charging document shall be deemed amended to conform to the evidence presented at any court proceeding.
4. Findings and Orders. The findings of the court shall be in writing in the form of a minute entry or order and shall state specifically for the record:
  - a. Whether each allegation in the revocation petition has been proven, and
  - b. The findings of fact which establish a violation of probation.
5. Disposition. If the court finds that a violation of a condition or regulation of probation has occurred, the court may proceed directly to disposition or set a disposition hearing pursuant to Rule 30. The court may revoke, modify, or continue probation.
6. Subsequent Acts. If the court which placed the juvenile on probation determines that the juvenile has been adjudicated delinquent or incorrigible for an act or acts committed subsequent to being placed on probation, the juvenile shall be found to be in violation of the terms of probation granted by the court. No violation hearing is required and the court may proceed directly to disposition or set a disposition hearing pursuant to Rule 30.

### **RULE 33. Disposition of Non-Felony Offenses.**

- A. Initiation of Proceedings. The referral for any designated non-felony offense, as provided by law, may be made by the filing of an Arizona Traffic Ticket and Complaint, otherwise known as a citation, in lieu of a petition.
- B. Service of Citation. The service of the citation upon the juvenile by a law enforcement official shall serve as notice that the juvenile is to appear at the location, date and time as stated on the citation.

## COMMITTEE COMMENT.

It was the determination of the committee that due to the number of lower courts which process non-felony offenses, statewide procedural rules would not permit individual counties the flexibility needed to dispose of such cases in the most efficient manner possible. **Further, amendments made to A.R.S. 8-323, as reflected in S.B. 1024, have clarified some of the provisions which have been most troublesome for the juvenile courts.**

### **RULE 34. Transfer For Criminal Prosecution.**

A. Initiation. If, in the opinion of the prosecutor, the juvenile is not a proper person over whom the juvenile court should retain jurisdiction, the prosecutor may file a motion with the clerk of the court requesting that the juvenile court waive jurisdiction and order the transfer of the juvenile to the appropriate court for criminal prosecution.

B. Motion and Complaint. A copy of the motion for transfer shall be accompanied by a criminal complaint which clearly designates the offense or offenses for which transfer is sought. The motion and complaint shall be filed with the clerk of the court.

1. Amendment to Complaint. Upon motion by the prosecutor, the court may amend the petition at any time before the transfer decision is made to conform to the evidence, but the juvenile shall not be transferred or held to answer for an offense different from the offense for which probable cause was found at the transfer hearing.

C. Service. Copies of the motion and complaint shall be served pursuant to Rule 15. An amended complaint shall be served upon the parties in the same manner as the original motion and complaint.

D. Time Limits. The motion and complaint shall be filed within fifteen (15) days of the date of the advisory hearing, except where permitted by the court upon a finding that good cause exists to delay the filing of the motion for transfer and that the juvenile will not suffer substantial prejudice as a result of the delay.

E. Transfer Investigation. Upon receipt of the motion for transfer, the juvenile probation officer shall conduct a transfer investigation and make a written report specifically addressing those issues which the court considers in determining whether to transfer the juvenile, as provided by law. A copy of the report shall be given to all parties or counsel not less than five (5) days prior to the transfer hearing unless the time is waived by the parties or their counsel.

1. **Evaluation of Juvenile.** At the time of the filing of the motion for transfer or subsequent thereto, the court, upon its own motion or at the request of any party may order that the juvenile submit to physical, psychological and/or psychiatric evaluations. The reports of experts made pursuant to this rule shall be submitted to the court within ten (10) working days of the completion of the examination and shall be made available to all parties, except that any statement or summary of the juvenile's statements concerning the offense charged shall be made available only to the juvenile. Upon receipt, court staff will copy and distribute the expert's report to the court and counsel for the juvenile. Counsel for the juvenile is responsible for editing a copy for the prosecutor which is to be returned to court staff within twenty-four (24) hours of receipt and made available to the prosecutor.
2. **Prior Transfer.** If the juvenile has previously been transferred for criminal prosecution by any juvenile court of this state, the court, in its discretion, may waive the provisions of (E) and (E1) above at any time before the hearing. Any prior orders of transfer, probation reports or reports pertaining to physical, psychological or psychiatric evaluations conducted as part of the prior transfer proceedings shall be provided to the parties and counsel.
3. **Incompetence.** The court shall not transfer a juvenile for criminal prosecution who is not competent.

F. **Transfer Hearing.** A transfer hearing shall be conducted only by a judge, except as provided in Ariz. R. Sup Ct 91(f). The transfer hearing shall be conducted in two phases which shall include a determination of probable cause whether an offense was committed and whether the juvenile committed the alleged offense and a determination whether public safety would best be served by the transfer of the juvenile for prosecution. The two phases may be heard consecutively or on separate dates as determined by the court.

1. **Time Limits.** A transfer hearing shall be held within thirty (30) days of the advisory hearing, except where the motion for transfer is filed after the advisory hearing, in which case the transfer hearing shall be held within thirty (30) days of the filing of the motion for transfer. The court may continue the hearing for good cause.
  - a. **Waiver.** The juvenile may waive an evidentiary hearing on either phase of the transfer proceeding. The evidentiary hearing on the probable cause phase of the transfer proceeding may be waived by written waiver, signed by the juvenile, the juvenile's counsel and the prosecutor. Prior to the acceptance of a waiver, the court shall inform the juvenile of the consequences of a waiver and the rights, pursuant to Rule 5.3 and 5.4(c), Ariz. R. Crim. P., which the juvenile is waiving. The court shall make written findings by minute entry or order of the waiver.

## 2. Probable Cause Determination.

- a. **Applicable Rules.** The probable cause determination shall be conducted in accordance with Rules 5.3 and 5.4(c), Ariz. R. Crim. P., and shall be on the record. The probable cause phase of the transfer hearing or a waiver thereof pursuant to these rules, shall constitute compliance with the defendant's right to a preliminary hearing under Rule 5, Ariz. R.Crim.P.
  - b. **Evidence.** Objections to evidence on the ground that it was acquired by unlawful means shall be inapplicable in the probable cause hearing.
  - c. **Probable Cause Finding.** If the court finds there is probable cause to believe that the offense has been committed and that the juvenile committed it, the court shall proceed to the public safety determination. If the court does not find probable cause as to the offense charged, the court may find probable cause as to lesser included offenses.
  - d. **No Probable Cause Finding.** If the court finds that probable cause does not exist, the court shall dismiss the complaint without prejudice.
  - e. **Transcript of Proceeding.** The transcript of the probable cause phase of the hearing shall be filed with the clerk of the superior court within twenty (20) days of the completion of the hearing if the juvenile is to be transferred.
3. **Public Safety Determination.** In determining whether public safety would best be served by transferring the juvenile, the court shall consider those factors as provided by law.
  4. **Order of Transfer.** If the court determines that transfer is appropriate, the court shall state its reasons in writing in the form of a minute entry or order.
  5. **No Transfer.** If the court determines that transfer is not appropriate, the court shall dismiss the motion to transfer and shall set an adjudication hearing within thirty (30) days of the order of dismissal. The complaint shall serve as the petition for purposes of further juvenile proceedings if transfer is denied.

## **RULE 35 Post Transfer.**

- A. After a finding that the juvenile should be transferred, the court shall:

1. Designate the counts of the criminal complaint upon which the juvenile will be tried in adult court and order that no further preliminary hearing or grand jury indictment shall occur;
2. Order that the complaint shall not be amended to add additional or different charges unless the juvenile consents. The complaint may, however, be amended to correct mistakes of fact in the complaint or to remedy formal or technical defects;
3. Conduct an initial appearance as required by Rule 4.2, Ariz. R. Crim. P. unless the court had previously done so at the advisory or transfer hearing. The following orders shall be entered:
  - a. An order holding the juvenile to answer the charge or charges upon which probable cause was found before the appropriate court or division, as if the juvenile were an adult;
  - b. An order regarding the juvenile's release on bail if the offense is bailable or on the juvenile's own recognizance and the conditions of release, if any, pursuant to Rule 7, Ariz. R. Crim. P.;
  - c. An order transferring custody of the juvenile to an appropriate law enforcement officer if the juvenile is not released;
  - d. An order that the juvenile appear before the appropriate criminal court or division for an arraignment at a specific date, location and time; and
  - e. An order appointing counsel to represent the juvenile in all further proceedings if the juvenile is indigent.
4. Inform the juvenile that a violation of the conditions of release or the failure to appear for an arraignment could result in the issuance of a warrant for the juvenile's arrest; and
5. Provide the juvenile with a copy of the conditions of release and the date, location and time of the next court appearance and have the juvenile acknowledge an understanding by signing a copy of the conditions of release and the next hearing date in the presence of the court.

B. Commencement of Criminal Proceedings. An action in the criminal court shall commence on the date of the decision by the juvenile court to transfer the juvenile. The date of the transfer decision shall be the date of arrest, service of summons and initial appearance for the purpose of Rule 8.2, Ariz. R. Crim.P.

## **PART III. DEPENDENCY, GUARDIANSHIP and TERMINATION OF PARENTAL RIGHTS.**

### **1. SCOPE OF RULES.**

**RULE 36. Scope of Rules.** These rules govern procedures in all dependency, termination of parental rights and Title 8 guardianship cases. The rules should be interpreted in a manner designed to protect the best interests of the child, giving paramount consideration to the health and safety of the child.

### **2. GENERAL PROVISIONS.**

#### **RULE 37. Definitions.**

A. Parties. Reference to a party to the action means a child, parent, guardian, the Arizona Department of Economic Security or petitioner, and any person or entity who has been permitted to intervene pursuant to Rule 24, Ariz. R. Civ. P., or the Indian Child Welfare Act.

B. Participants. Participants shall include foster parents and any other person permitted by the court or authorized by law to participate in the proceedings. Participants shall be notified of all applicable proceedings, as required by law or ordered by the court.

#### **C. Definitions pursuant to the Indian Child Welfare Act, 25 U.S.C. 1901 et. seq:**

- 1. Parent. The term parent means any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.**
- 2. Indian Child. The term Indian child means any unmarried person under the age of eighteen (18) and who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe.**

3. **Indian Child's Tribe.** The term Indian child's tribe means the Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.
4. **Indian Custodian.** The Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody and control has been transferred by the parent of the child.
5. **Indian Tribe.** Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c).
6. **Extended Family Member.** The term extended family member means a person as defined by law or custom of the Indian child's tribe, or, in the absence of such law or custom, means a person who has reached the age of eighteen (18) and who is the Indian child's grandparent, aunt or uncle, sister or brother, sister-in-law or brother-in-law, niece or nephew, first or second cousin, or step-parent.
7. **Foster Care or Preadoptive Placement Preferences.** Any child accepted for foster care or preadoptive placement shall be in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child shall be placed within a reasonable proximity to the child's home, taking into account any special needs of the child. In the absence of good cause to the contrary, preference shall be given to the following placements:
  - a. A member of the Indian child's extended family;
  - b. A foster home licensed, approved or specified by the Indian child's tribe;
  - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - d. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

### **RULE 38. Assignment, Appointment of Counsel.**

A. Assignment of Counsel. Counsel shall be assigned to represent those persons entitled to counsel as provided by law, from the filing of a dependency petition through the preliminary protective hearing until the court formally appoints counsel or otherwise relieves assigned counsel. Counsel is required to meet with the client prior to the preliminary protective hearing. Assigned counsel is not counsel of record for purposes of accepting service of process for a parent, guardian **or Indian custodian** who does not appear for the preliminary protective hearing.

B. Appointment of Counsel. The court shall order the appointment of counsel for those persons entitled to counsel and determined to be indigent, as provided by law. In determining whether a person is indigent, the court shall:

1. Order the person to provide proof of financial resources by filing a financial questionnaire provided by the court. The court may question the person under oath. If the court determines the person is not indigent the court may order the person to pay a reasonable portion of the cost of counsel or deny the request for appointment of counsel.

C. Manner of Appointment. If the court enters an order appointing or denying counsel, a copy of the order or minute entry shall be provided to the parties.

### **RULE 39. Appearance of Counsel.**

A. Appearance. Counsel shall enter an initial appearance by appearing personally before the court and advising the court that counsel is representing a party or by filing a written notice of appearance with the clerk of the court and providing copies to the assigned judge and all parties.

B. Withdrawal of Counsel. Requests to withdraw as counsel shall be in writing unless otherwise authorized by the court. Counsel shall represent a party until:

1. The dependency action is dismissed and the time for filing a notice of appeal has expired; or
2. The issuance of an appellate mandate if counsel was ordered to represent the party on appeal; or
3. The court orders the termination of representation.

#### **RULE 40. Appointment of Guardian Ad Litem.**

A. The court may appoint a guardian ad litem to protect the interest of the child. The guardian ad litem may be an attorney, volunteer special advocate or other qualified person.

B. In any proceeding where a parent, guardian **or Indian custodian** is under eighteen (18) years of age, the court may appoint a guardian ad litem to protect the interests of such parent.

C. If the court has reason to believe a parent, guardian **or Indian custodian** may be incompetent, the court shall appoint a guardian ad litem to conduct an investigation and report to the court as to whether the parent, guardian **or Indian custodian** may be incompetent and in need of protection. The court shall conduct hearings and enter orders as determined to be necessary to protect the interests of the parent, guardian **or Indian custodian**.

#### **RULE 41. Attendance at Hearings.**

A. Only those persons permitted by law may attend dependency, guardianship and termination of parental rights proceedings. The court may exclude any person whose presence the court finds would impede the full and fair presentation of the evidence.

B. The court may limit the presence of a participant to the time of the participant's testimony if:

1. It is in the best interest of the child; or
2. It is necessary to protect the privacy interests of the parties and will not be detrimental to the child.

C. The court may impose reasonable restrictions as may be required by the physical limitations of the facility or to maintain order and decorum.

#### **RULE 42. Telephonic Testimony, Video Conferencing.**

Upon the courts own motion or motion by a party, the court may permit telephonic testimony or argument or video conferencing in any dependency, guardianship or termination of parental rights hearings. The motion shall be in writing pursuant to Rule 46, unless otherwise authorized by the court.

### **RULE 43. Computation of Time.**

Unless otherwise stated in these rules, time shall be computed in accordance with Rule 6, Ariz. R. Civ. P.

### **RULE 44. Disclosure and Discovery.**

A. Scope of Disclosure. All information which is not privileged shall be disclosed. Disclosure shall be made in the least burdensome and most cost effective manner which shall include the inspection of materials, with or without copying. Disclosure shall include, but is not limited to the following:

1. Reports prepared by or at the request of any party;
2. Reports of any social service provider;
3. Foster Care Review Board and Court Appointed Special Advocate reports;
4. Transcripts of interviews and prior testimony;
5. Probation reports;
6. Photographs;
7. Physical evidence;
8. Records of prior criminal convictions;
9. Medical and psychological records and reports;
10. Results of medical or other diagnostic tests; and
11. Any other information relevant to the proceedings.

B. Time Limits for Disclosure in Dependency Proceedings.

1. Documentary Evidence. Within twenty-four (24) hours prior to the preliminary protective hearing, the parties shall provide to each other all documents within their

possession which may be subject to disclosure. Unless otherwise authorized by the court, any document received by or prepared by the party thereafter shall be disclosed within five (5) days of receipt or preparation. If a hearing is scheduled prior to the expiration of the five (5) days, disclosure shall be made prior to the hearing.

2. Disclosure Statement Prior to Contested Adjudication Hearing. Unless otherwise ordered by the court, the parties shall disclose to each other the following information within sixty (60) days after the preliminary protective hearing or service of the petition upon a party not appearing at the preliminary protective hearing if the matter is set for a contested adjudication hearing:

- a. The uncontested facts deemed material;
- b. The contested issues of fact and law which may be material or applicable;
- c. A statement of other issues of fact or law which the party believes to be material;
- d. A list of the witnesses the party intends to call at trial, which shall include the names, addresses and telephone numbers of the witnesses in addition to a description of the substance of the witness' expected testimony. No witness shall be called at trial other than those disclosed in accordance with this rule, except for good cause shown. Witnesses whose testimony will be offered in the form of a deposition shall be noted; and
- e. A list of and copies of all exhibits which the party intends to use at trial. If a party objects to the admission of an exhibit, the party shall file a notice of objection and the specific grounds for each objection and provide a copy of the notice to all parties and the court within ten (10) days of receipt of the exhibit. Specific objections or grounds not identified in the notice of objection shall be deemed waived, unless otherwise ordered by the court. No exhibits shall be used at trial other than those disclosed in accordance with this rule, except for good cause shown.

#### C. Time Limits for Disclosure in Guardianship Proceedings.

1. Documentary Evidence. Any document received by or prepared by the party shall be disclosed within five (5) days of receipt. If a hearing is scheduled prior to the expiration of the five (5) days, disclosure shall be made prior to the hearing.

2. Disclosure Statement Prior to Guardianship Adjudication Hearing. Unless otherwise ordered by the court, the parties shall disclose to each other the information identified in subsection (B)(2)(a-e) of this rule and the report required by A.R.S. 8-872(E) and Rule 61(D) within thirty (30) days of the initial hearing. The provisions of subsection (B)(2)(e) shall govern objections to the admissibility of exhibits.

D. Time Limits for Disclosure in Termination Proceedings.

1. Documentary Evidence. Any document received by or prepared by the party thereafter shall be disclosed within five (5) days of receipt. If a hearing is scheduled prior to the expiration of the five (5) days, disclosure shall be made prior to the hearing.
2. Disclosure Statement Prior to Termination Adjudication Hearing. Unless otherwise ordered by the court, the parties shall disclose to each other the information identified in subsection (B)(2)(a-e) of this rule, and any social study prepared pursuant to A.R.S. 8-536 or by order of the court within thirty (30) days after the initial hearing. The provisions of subsection (B)(2)(e) shall govern admissibility of exhibits.

E. Methods of Discovery. The parties may utilize methods of discovery as set forth in Rules 26-37, Ariz. R. Civ. P., upon the agreement of the parties. Absent such agreement, the party seeking to utilize such methods of discovery shall file a motion with the court requesting authorization to proceed and shall set forth the reasons why such methods are necessary. Failure to complete discovery prior to the date set for the dependency adjudication hearing does not constitute good cause or extraordinary circumstances for purposes of Rule 55(B).

F. Conclusion of Discovery. All discovery shall conclude upon the filing of an individual or a joint pretrial statement, if ordered by the court or ten (10) days prior to an adjudication hearing. The court may permit the introduction of evidence obtained after the close of discovery upon a showing of good cause. Unless otherwise ordered by the court, the parties may supplement the list of witnesses and exhibits to be used at the adjudication hearing no later than ten (10) days prior to the hearing.

G. Sanctions. Upon motion of a party or the court's own motion, the court may impose sanctions upon a party who fails to disclose information in its possession which is subject to disclosure or fails to disclose such information in a timely manner as required by this rule. Sanctions may include precluding the evidence, granting a continuance or entering any order against a party as deemed appropriate. Any sanction imposed should be in accordance with the intent of these rules, as set forth in Rule 36.

## **RULE 45. Admissibility of Evidence.**

A. Admissibility. Except as provided in these rules, the admissibility of evidence shall be governed by the Arizona Rules of Evidence, 17A A.R.S.

B. Definition of Report. For purposes of this rule, a written report by a protective services worker shall mean a narrative report setting forth, as appropriate to the hearing, the following:

1. The reasons the child was removed from the custody of the parent, guardian **or Indian custodian**;
2. The services provided to prevent removal;
3. The case plan goal and the services provided to achieve the goal;
4. Steps taken by the parent, guardian **or Indian custodian** to comply with the case plan;
5. The child's current placement **and, in the case of an Indian child, whether the placement falls within the preferences as set forth in the Act or whether good cause exists to deviate from the preferences**;
6. The services provided to meet the child's needs;
7. Recommended dispositional orders;
8. Recommended changes to the case plan goal, services or placement; and
9. Recommended permanent plan.

The report shall not include any appendices or reports prepared by persons other than the protective services worker. The term report does not include a social study prepared pursuant to A.R.S. 8-536 or by order of the court in termination proceedings, or the report required by A.R.S. 8-872(E) and Rule 61(D).

C. Admissibility of Reports. The court shall admit into evidence written reports prepared by a protective services worker and submitted to the court if the worker who prepared the report is available for cross-examination and the report was disclosed to the parties no later than:

1. One (1) day prior to the preliminary protective hearing; or

2. Fifteen (15) days prior to any other hearing.

D. Purposes of Admission. The report prepared by a protective services worker shall be admitted as evidence, pursuant to this rule, for the limited purpose of showing:

1. The petitioner's efforts to prevent the removal of the child from the custody of the parent, guardian **or Indian custodian**;
2. The petitioner's efforts to provide services to achieve the case plan goal;
3. The parent, guardian **or Indian custodian's** compliance with the case plan; and
4. The basis for the protective services worker's opinion as to the case plan goal, placement of the child and necessary services.

E. Termination Social Study. A social study prepared pursuant to A.R.S. 8-536 or by order of the court is admissible as evidence unless a party has filed a notice of objection as required by Rule 44 (B)(2)(e) and (D)(2). If the court sustains any objections, the court may:

1. Admit the social study into evidence after redacting those portions to which objections were sustained; and
2. Allow the petitioner a reasonable opportunity to call additional witnesses to testify regarding the redacted portions of the social study.

F. Statement of Child. Evidence of the out of court statements or nonverbal conduct of a child regarding acts of abuse or neglect perpetrated on the child is admissible for all purposes in any hearing subject to these rules if the time, content and circumstances of such statement or conduct provide sufficient indicia of its reliability.

#### **RULE 46. Motions.**

A. Form. All motions shall be in writing, unless otherwise authorized by the court, and shall set forth the basis for the relief sought. The party filing the motion shall state the positions of the other parties as to the issues raised in the motion or shall inform the court of the efforts made to reach the other parties if their positions are not known.

B. Filing. All motions shall be filed with the clerk of the court and copies provided to the assigned judge at the time of filing. If no judge has been assigned to the matter, a copy of the motion shall be provided to the court administrator. All parties shall be served copies by mail, hand delivery, fax or by electronic means.

C. Response. All responses to a motion shall be filed within five (5) days of service of the motion by hand delivered, fax or by electronic means. Service shall be deemed completed upon receipt if served by hand delivery, fax or by electronic means. If the motion is served by mail, a response is due within ten (10) days of service by mail. No reply shall be filed unless authorized by the court. The court may rule on the motion, with or without a hearing, if the motion states there is no objection or the time for filing an objection has expired. For cause shown, the court may at any time, with or without motion or notice, enlarge or reduce time frames if the request is made before the expiration of the originally prescribed period or as extended by prior order.

D. Motion for Summary Judgment. A motion for summary judgment shall conform to the requirements set forth in Rule 56, Ariz. R. Civ. P. and Rule IV(f), Uniform Rules of Practice of the Superior Court, except that the motion shall be filed not less than thirty (30) days prior to trial or within the time frames set forth by the court.

E. Motion to Set Aside Judgment. A motion to set aside a judgment rendered by the court shall conform to the requirements of Rule 60(c), Ariz. R. Civ. P., except that the motion shall be filed within six (6) months of the final judgment, order or proceeding unless the moving party alleges grounds pursuant to Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within three (3) months of the final judgment.

F. Motion to Continue. Any motion to continue shall be made in good faith and shall state with specificity the reasons for the continuance. The party requesting the continuance shall advise the court of impending expiration of time limits. Motions to continue shall be granted only upon a showing of good cause.

#### **RULE 47. Release of Information.**

All records pertaining to dependency, guardianship and termination of parental rights shall be maintained as confidential and shall be withheld from public inspection except upon order of the court or as otherwise provided by law.

### 3. DEPENDENCY

#### **RULE 48. Petition, Temporary Orders, Notice of Hearing and Service of Process.**

A. Petition. A petition on behalf of a dependent child shall be generally in the form and contain the information required by law, the action shall be captioned, "In the Matter of\_, a person under the age of 18 years," may be based upon information and belief and shall state whether the child is an Indian child as defined by the Indian Child Welfare Act.

B. Temporary Orders. When the interests of the child require immediate action, upon the filing of a petition under oath, the court may enter an order making the child a temporary ward of the court pending the hearing, which shall be scheduled at that time.

C. Notice of Hearing. In addition to information required by law, the notice of hearing shall advise the parent, guardian **or Indian custodian** that failure to appear, without good cause shown, may result in a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the petition. The notice shall state that the hearings may go forward in the absence of the parent, guardian **or Indian custodian** and may result in an adjudication of dependency, the termination of parental rights or the establishment of a permanent guardianship based upon the record and evidence presented.

D. Service of Petition. The petitioner shall serve a copy of the petition, notice of hearing and temporary orders upon those persons as required by law. The petitioner shall provide any parent, guardian **or Indian custodian** appearing at the preliminary protective hearing with a copy of the petition, notice of hearing and temporary orders which shall constitute service, as provided by law. Otherwise, the petition, notice of hearing and temporary orders shall be served in the manner provided for in Rules 4.1 or 4.2, Arizona Rules of Civil Procedure, except that:

1. References to service of summons are inapplicable since no summons is issued;
2. Reference to plaintiff shall mean the petitioner;
3. Reference to defendant shall mean the respondent or respondents;
4. No responsive pleading to the petition is required. A party served shall appear and answer at the time and place indicated on the notice of hearing and temporary orders served with the petition;

5. Service of process within Arizona by mail shall be as follows: When the address of a person who resides outside the county is known, the person may be served by depositing a copy of the petition, notice of hearing and temporary order in the post office, postage prepaid, to be sent to the person to be served by any form of mail requiring a signed and returned receipt. Service by mail pursuant to this section and the return may be made by the party procuring service or by that party's attorney. Upon receipt through the post office of the signed receipt, the serving party shall file an affidavit with the court stating:
  - a. The circumstances warranting the utilization of service by mail;
  - b. That copies of the petition, notice of hearing and temporary orders were dispatched to the person being served;
  - c. That the copies were in fact received by the person to be served as evidenced by the receipt, a copy of which shall be attached to the affidavit; and
  - d. The date of receipt by the party being served and the date the receipt was received by the sender.

The affidavit shall be prima facie evidence of personal service of the petition, notice of hearing and temporary orders, and service shall be deemed complete from the date of receipt by the party being served, provided that such completion is no less than five (5) days prior to the hearing and that the affidavit required by this section has been filed prior to or at the time of hearing.

6. Otherwise, service of process within Arizona shall be pursuant to Rule 4.1, Ariz. R. Civ. P., paragraphs (d) Service of Summons Upon Individuals, (g) Service of Summons Upon Incompetent Person, (m) Alternative or Substituted Service or (n) Service by Publication and Return;
7. Service Upon Conservator for a Minor. If a conservator has been appointed for the child, the conservator shall be served pursuant to Rule 4.1, Ariz. R. Civ. P.;
8. Service of process outside the state shall be pursuant to Rule 4.2, Arizona Rules of Civil Procedure paragraphs (a) Extraterritorial Jurisdiction and Personal Service Out of State, (b) Direct Service, (c) Service by Mail and Return, (f) Service by Publication and Return, (i) Service Upon Individuals in a Foreign Country or (j) Service Upon Minors and Incompetent Persons in a Foreign country; and

9. If the petition alleges or the court has reason to believe the child at issue is an Indian child as defined by the Indian Child Welfare Act, in addition to service of process as required by these rules, notification shall be given to the parent, Indian custodian and child's tribe. **Notice shall be provided by registered mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, notice shall be given to the Secretary of the Interior by registered mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (20) additional days to prepare for the hearing if a request is made by the parent or Indian custodian or the tribe.**

- a. **Waiver. The parent, Indian custodian or the child's tribe may waive the ten (10) day notice requirement for purposes of proceeding with the preliminary protective hearing within the time limit as provided by state law.**

E. Amended Petitions. A petition may be amended by the petitioner upon order of the court not less than thirty (30) days prior to trial unless good cause is shown. A motion to amend shall accompany the amended petition and the amended petition shall be served pursuant to paragraph (D) of this rule. Petitions amended to add allegations against a parent not set forth in the original petition shall be served pursuant to Rule 5(c), Ariz. R. Civ. P.

#### **COMMITTEE COMMENT.**

**It was the determination of the committee that a provision permitting the parent, Indian custodian or the child's tribe to waive the ten (10) day notice requirement is not in conflict with the Indian Child Welfare Act and is reflective of current practice in some counties. Some of the tribes currently waive time in order to permit the preliminary protective hearing to proceed within the statutory time limits if the tribe is provided with sufficient information concerning the case in advance of the hearing. It is the belief of the committee that the inclusion of the waiver provision is necessary to ensure timely disposition of cases without interfering with the rights afforded the parent, Indian custodian or the tribe pursuant to the Indian Child Welfare Act.**

## **RULE 49. Pre-Hearing Conference.**

A. Purpose. The purpose of the pre-hearing conference is to facilitate the resolution of issues in a non-adversarial manner concerning custody, placement, visitation and the provision of services to the child and family. Statements made by the parties and participants in the course of the pre-hearing conference may be used in future proceedings.

B. Participants. Those persons authorized by law to attend the preliminary protective hearing may attend the pre-hearing conference.

C. Appointment of Facilitator. Prior to the commencement of the pre-hearing conference, the court shall appoint a facilitator who may not be a party or the representative of a party to the proceedings. The facilitator shall foster orderly communication, encourage the participation of all parties and identify areas of agreement among the parties.

D. Procedure. The facilitator, parties and participants shall meet outside the presence of the court in an effort to reach agreement on the custody and placement of the child, visitation, and the services to be provided to the child and family. The court may impose reasonable restrictions upon those in attendance as may be required by the physical limitations of the facility, to maintain order and decorum and to ensure the ability of the parties to fully participate in the conference. At the conclusion of the pre-hearing conference, the parties shall proceed to the preliminary protective hearing.

### **COMMITTEE COMMENT.**

Nothing in this rule precludes the appointment of a facilitator or mediator who is part of the child welfare mediation program established within the office of the attorney general pursuant to A.R.S. 8-809.

## **RULE 50. Preliminary Protective Hearing.**

A. Purpose. At the preliminary protective hearing, the court shall determine whether continued temporary custody of the child is necessary and shall enter appropriate orders as to custody, placement, visitation and the provision of services to the child and family.

B. Procedure. At the preliminary protective hearing, the court shall:

1. Inquire if any party has reason to believe that the child at issue is subject to the Indian Child Welfare Act;

2. Appoint counsel pursuant to Rule 38(B);
3. Determine whether service has been completed pursuant to Rule 48 or waived as to each party;
4. Identify all documents the court has received and will consider;
5. Review any agreements or stipulations reached at the pre-hearing conference to determine whether the agreement gives paramount consideration to the health and safety of the child. The court may approve or modify any agreements reached by the parties and enter orders as appropriate;
6. Conduct a review of temporary custody as set forth in Rule 51 if no agreement as to placement has been approved by the court;
7. Conduct the initial dependency hearing as set forth in Rule 52 for any party who is present and has been served. The court shall set a continued initial hearing as to any party who was not served and did not appear; and
8. Determine whether a proposed case plan for services has been submitted and is appropriate.

The court shall additionally determine whether the Arizona Department of Economic Security has made arrangements for the assembly of the medical records of the child, a medical assessment of the child, the implementation of referrals and the communication of recommendations and results, as provided by law.

C. Findings and Orders. All findings and orders, including any agreements reached by the parties, shall be in writing and signed by the court, in the form of an order or minute entry, and shall be provided to the parties at the conclusion of the hearing. The court shall:

1. Make findings and enter orders regarding temporary custody as required by law and Rule 51;
2. Make findings and enter orders as required by Rule 52(D);
3. **Order the petitioner to obtain verification of the child's Indian status from the child's Indian tribe or from the United States Department of Interior, Bureau of Indian Affairs, if the court has reason to believe the child is an Indian child;**

4. Make findings and enter orders regarding services for the child and family, including visitation, as required by law;
5. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend the pretrial conference, the settlement conference or the dependency adjudication hearing, without good cause shown, may result in a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the dependency petition. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian** and may result in a finding of dependency based upon the record and evidence presented. The party shall also be advised that failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
6. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
7. Make findings and enter any other orders as may be appropriate or required by law, including the preparation of a disposition report as required in Rule 56.

#### **COMMITTEE COMMENT.**

It is the recommendation of the committee that, in addition to the admonition set forth in this rule, the court should consider providing the parent, guardian **or Indian custodian** with a written copy of the admonition in order to protect the due process rights of the parent, guardian **or Indian custodian**. See FORM I.

#### **RULE 51. Review of Temporary Custody.**

A. Purpose. If requested by the parent, guardian **or Indian custodian** at the preliminary protective hearing, the court shall conduct a review of temporary custody to determine whether removal of the child was necessary and whether the child should remain in out-of-home placement.

B. Burden of Proof. The petitioner shall have the burden of proving that there is probable cause to believe that continued temporary custody of the child is clearly necessary to prevent abuse or neglect. **In addition, if the child is an Indian child, the petitioner shall have the burden of proving by clear and convincing evidence, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The petitioner must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.**

C. Procedure. The temporary custody hearing shall proceed as follows:

1. Evidence presented in support of or to rebut a finding of temporary custody may include evidence which is hearsay, in whole or in part, or as provided by statute;
2. Evidence relating to placement, visitation or services shall be permitted only as it relates to the issue of continued custody; and
3. At the conclusion of the petitioner's case, the parent, guardian **or Indian custodian** shall be permitted to present evidence in support of the child's return.

D. Findings and Orders. The court shall determine, based upon the evidence presented, whether there is probable cause to believe that temporary custody is clearly necessary to prevent further abuse or neglect. **If the child is an Indian child, the court shall also determine, by clear and convincing evidence, including testimony from a qualified expert witness, whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The court must be satisfied that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.** If the petitioner failed to meet the burden of proof, the court shall order the return of the child to the parent, guardian **or Indian custodian**. If the petitioner has met the burden of proof, the court may continue the child in out-of-home placement.

## **RULE 52. Initial Dependency Hearing.**

A. Purpose. At the initial dependency hearing, the court shall determine whether service has been completed and whether the parent, guardian **or Indian custodian** admits, denies or does not contest the allegations contained in the dependency petition.

B. Time Limits. The initial hearing shall be held at the time of the preliminary protective hearing if the parent, guardian **or Indian custodian** appears or within twenty-one (21) days of the filing of the petition. If service by publication is required, the initial hearing shall be held no sooner than ten (10) days following the completion of service.

C. Procedure. At the initial hearing the court shall:

1. Inquire if any party has reason to believe that the child at issue is subject to the Indian Child Welfare Act;
2. Appoint counsel pursuant to Rule 38(B);
3. Determine whether service of process has been completed pursuant to Rule 48 or waived as to each party;
4. Advise the parent, guardian **or Indian custodian** of their rights as follows:
  - a. The right to counsel, including court appointed counsel if the parent, guardian **or Indian custodian** is indigent;
  - b. The right to cross examine all witnesses who are called to testify against the parent, guardian **or Indian custodian**;
  - c. The right to trial by the court on the allegations in the dependency petition; and
  - d. The right to use the process of the court to compel the attendance of witnesses.
5. Determine whether paternity has been established as to any father and take testimony from the mother concerning the identity and location of any potential father; and
6. Inquire of the parent, guardian **or Indian custodian** whether they wish to admit, deny or not contest the allegations contained in the dependency petition.
  - a. Admission/No Contest. If the parent, guardian **or Indian custodian** admits or does not contest the allegations in the petition, the court shall proceed with the dependency adjudication hearing pursuant to Rule 55 and set or conduct a disposition hearing pursuant to Rule 56.

- b. Denial. If the parent, guardian **or Indian custodian** denies the allegations contained in the petition, the court shall set a settlement conference, pretrial conference or mediation and continue the child as a temporary ward of the court pending adjudication.
- c. Failure to Appear. If the parent, guardian **or Indian custodian** fails to appear at the initial hearing without good cause shown, and the court finds the parent, guardian **or Indian custodian** had notice of the hearing, was properly served pursuant to Rule 48, and that the notice of hearing advised the parent, guardian **or Indian custodian** regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian**, and that failure to appear may constitute a waiver of rights and an admission to the allegation contained in the dependency petition, the court may adjudicate the child dependent if the petitioner has established grounds upon which to adjudicate the child dependent, based upon the record and evidence presented. The court shall enter findings and orders pursuant to Rule 55.

D. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. At the conclusion of the initial hearing the court shall:

- 1. Enter findings as to notification and service upon the parties and the court's jurisdiction over the subject matter and person before the court;
- 2. Order the petitioner to effectuate service by publication if the requirements of Rules 4.1(N) or 4.2(F), Ariz. R. Civ. P. are established, and it appears that the party cannot reasonably be located;
- 3. **Order the petitioner to obtain verification of the child's Indian status from the child's Indian tribe or from the United States Department of Interior, Bureau of Indian Affairs, if there is reason to believe the child is an Indian child;**
- 4. Order that paternity be established, through paternity testing or authorize the execution of affidavits of paternity, as to any alleged father;
- 5. Set a continued initial hearing as to any party who was not served and did not appear;
- 6. Affirm prior orders making the child a temporary ward of the court;
- 7. Set a settlement conference, a pretrial conference or order the parties to attend mediation;

8. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend the pretrial conference, the settlement conference or the dependency adjudication hearing, without good cause shown, may result in a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the dependency petition. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian** and may result in a finding of dependency based upon the record and evidence presented. The party shall also be advised that failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
9. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
10. Make findings and enter any other orders as may be appropriate or required by law, including the preparation of a disposition report as required in Rule 56.

E. Continuance. The court may continue the initial dependency hearing, upon a showing of good cause, for reasons which may include:

1. Service of process and/or notification pursuant to the Indian Child Welfare Act has not been completed as to the parties;
2. Additional time is requested by the child's tribe or if additional time is required to comply with the requirements of the Indian Child Welfare Act; or
3. Additional time is required to obtain and/or consult with counsel and the best interests of the child would not be adversely affected.

#### **COMMITTEE COMMENT.**

See comment to Rule 50.

## **RULE 53. Settlement Conference.**

A. Purpose. A settlement conference may be held for the purpose of identifying and resolving issues in a non-adversarial manner. In order to facilitate the conference, counsel shall meet with their clients prior to the conference.

B. Settlement Conference Memorandum. At least five days prior to the settlement conference, each party shall provide with the court with a confidential settlement conference memorandum, which shall address the following:

1. A general description of the issues to be litigated and the position of each party with respect to each issue;
2. A general description of the evidence to be presented by each party;
3. A summary of any attempts to settle the matter;
4. An assessment by each party of the anticipated result if the matter did proceed to trial; and
5. Any other information a party believes would be helpful to the settlement process, including acceptable settlement proposals.

C. Procedure.

1. Statements made in the course of settlement negotiations shall not be used in future hearings, except as permitted by Rule 408, Ariz. Rules of Evidence;
2. The court may engage in ex parte communications with the consent of all those participating in the conference; and
3. If the parties are unable to reach agreement as to all issues, the parties shall advise the court of those issues which will be litigated and the time needed to conduct the dependency adjudication hearing.

D. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. At the conclusion of the settlement conference, the court may:

1. Adjudicate the child dependent and enter findings and orders pursuant to Rule 55 and set or conduct a disposition hearing pursuant to Rule 56, if the court finds the parent, guardian **or Indian custodian** admits or does not contest that the child is dependent;
2. Adjudicate the child dependent and enter findings and orders pursuant to Rule 55 and set or conduct a disposition hearing pursuant to Rule 56 if the court finds that the parent, guardian **or Indian custodian** failed to appear at the settlement conference without good cause shown, had notice of the hearing, was properly served pursuant to Rule 48 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** and that failure to appear may constitute a waiver of rights and an admission to the allegation contained in the dependency petition. The court may adjudicate the child dependent based upon the record and evidence presented if the petitioner has established grounds upon which to adjudicate the child dependent;
3. Set a dependency adjudication hearing and may set a pretrial conference if the parties are unable to reach agreement;
4. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend the pretrial conference or the dependency adjudication hearing, without good cause shown, may result a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the dependency petition. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian** and may result in a finding of dependency based upon the record and evidence presented. The party shall also be advised that failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
6. Make findings and enter any other orders as may be appropriate or required by law, including the preparation of a disposition report as required in Rule 56.

## COMMITTEE COMMENT.

See comment to Rule 50.

### **RULE 54. Pretrial Conference.**

A. Purpose. A pretrial conference may be held prior to the dependency adjudication hearing to determine whether the parties are prepared and intend to proceed to trial or whether resolution of remaining issues in a non-adversarial manner is possible and to address any issues raised by the parties. Counsel shall meet with their clients prior to the conference.

#### B. Procedure.

1. If the parties wish to discuss possible settlement, the court shall conduct a settlement conference pursuant to Rule 53; or
2. If the parties advise the court that the matter will proceed to trial, the parties and the court shall confer to determine:
  - a. Whether disclosure has been made pursuant to Rule 44(B)(2);
  - b. The time needed for trial;
  - c. The scheduling of witnesses; and
  - d. Any other issues raised by the parties as may be appropriate.

C. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. At the conclusion of the pretrial conference, the court may:

1. Adjudicate the child dependent and enter its findings and orders pursuant to Rule 55 and set or conduct a disposition hearing pursuant to Rule 56 if the court finds the parent, guardian **or Indian custodian** admits or does not contest that the child is dependent;
2. Adjudicate the child dependent and enter findings and orders pursuant to Rule 55 and set or conduct a disposition hearing pursuant to Rule 56 if the court finds that the parent, guardian **or Indian custodian** failed to appear at the pretrial conference without good cause shown, had notice of the hearing, was properly served pursuant to Rule 48 and had

been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the dependency petition. The court may adjudicate the child dependent based upon the record and evidence presented if the petitioner has established grounds upon which to adjudicate the child dependent;

3. Set a dependency adjudication hearing date if the parties are unable to reach agreement. The court may order the parties to submit individual or joint pretrial statements to each other and the court prior to trial and/or submit proposed findings of fact and conclusions of law. The pretrial statement shall contain the information set forth in Rule 44(B)(2)(a-e);
4. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend the dependency adjudication hearing, without good cause shown, may result in a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the dependency petition. The court shall advise the parent, guardian **or Indian custodian** that the hearing may go forward in the absence of the parent, guardian **or Indian custodian** and may result in a finding of dependency based upon the record and evidence presented. The party shall also be advised that failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
6. Make findings and enter any other orders as may be appropriate or required by law, including limiting the issues to be litigated at the dependency adjudication hearing and ordering the preparation of a disposition report as required in Rule 56.

#### **COMMITTEE COMMENT.**

See comment to Rule 50.

## **RULE 55. Dependency Adjudication Hearing.**

A. Purpose. The court shall conduct the adjudication hearing for the purpose of determining whether the petitioner has met the burden of proving the child dependent.

B. Time Limits. The dependency adjudication hearing shall be completed within ninety (90) days of service of the dependency petition on the parent, guardian **or Indian custodian**. The court may continue a dependency adjudication hearing beyond the time prescribed by law only upon a finding of extraordinary circumstances. Extraordinary circumstances include but are not limited to acts or omissions that are unforeseen or unavoidable. Any party requesting a continuance shall file a motion for extension of time, setting forth the reasons why extraordinary circumstances exist. The motion shall be filed within five (5) days of the discovery that extraordinary circumstances exist. The court's finding of extraordinary circumstances shall be in writing and shall set forth the factual basis for the continuance.

C. Burden of Proof. The petitioner must prove the allegations in the petition by a preponderance of the evidence. **In addition, if the child is an Indian child, the petitioner must prove, by clear and convincing evidence, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The petitioner must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.**

D. Procedure. The presentation of evidence at the dependency adjudication hearing shall be as informal as the requirements of due process and fairness permit and shall generally proceed in a manner similar to the trial of a civil action before the court without a jury.

1. Admission/No Contest. A parent, guardian **or Indian custodian** may waive the right to trial on the allegations contained in the dependency petition by admitting or not contesting the allegations. An admission or plea of no contest may be oral or in writing. In accepting an admission or plea of no contest, the court shall:

- a. Determine whether the party understands the rights being waived;
- b. Determine whether the admission or plea of no contest is knowingly, intelligently and voluntarily made;
- c. Determine whether a factual basis exists to support a finding of dependency; and

d. Proceed with entering the findings and orders as set forth in subsection (E) of this rule.

2. Failure to Appear. If the parent, guardian **or Indian custodian** fails to appear at the dependency adjudication hearing without good cause shown and the court finds the parent, guardian **or Indian custodian** had notice of the hearing, was properly served pursuant to Rule 48 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the dependency petition, the court may adjudicate the child dependent based upon the record and evidence presented if the petitioner has proven grounds upon which to adjudicate the child dependent. The court shall enter its findings and orders pursuant to subsection (E) of this rule.
3. Amendments to Conform to Evidence. Any amendments made to conform to the evidence shall be made pursuant to Rule 15(b), Ariz. R. Civ. P.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. As to each parent, guardian **or Indian custodian**, based upon the record and evidence presented, the court shall:

1. Enter findings that the court has jurisdiction over the subject matter and person before the court;
2. Dismiss the petition and return the child to the parent, guardian **or Indian custodian** if the petitioner fails to meet the required burden of proof; or
3. Set forth specific findings of fact in support of a finding of dependency and adjudicate the child dependent, as defined by law, if the petitioner met the burden of proof; and
4. Conduct the disposition hearing pursuant to Rule 56 or set the disposition hearing within thirty (30) days and order the preparation of a disposition report as required by Rule 56(C);
5. Enter orders concerning the placement and custody of the child pending disposition;
6. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend further proceedings without good cause shown and failure to participate in reunification services may result in the

termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian**. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;

7. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
8. Make findings and enter any other orders as may be appropriate or required by law.

#### **COMMITTEE COMMENT.**

It is the recommendation of the committee that, in addition to the admonition set forth in this rule, the court should consider providing the parent, guardian **or Indian custodian** with a separate written copy of the admonition in order to protect the due process rights of the parent, guardian **or Indian custodian**. See FORMS II and III.

#### **RULE 56. Disposition Hearing.**

A. Purpose. The court shall conduct a disposition hearing to determine the appropriate case plan, services and placement of a child who has been adjudicated dependent.

B. Time Limits. The disposition hearing shall be held within thirty (30) days of the dependency adjudication or in conjunction with the preliminary protective hearing, initial dependency hearing, mediation, settlement or pretrial conference or dependency adjudication hearing.

C. Disposition Report. The court may order the petitioner to prepare and file a disposition report which shall include dispositional recommendations and the basis for the recommendations made. The report shall be provided to the court and the parties five (5) days prior to the hearing, unless otherwise ordered by the court.

D. Procedure. If a notice of intent to discontinue reunification services has been filed, the court shall enter temporary dispositional orders and proceed to hearing as set forth in Rule 57. Otherwise, the court shall determine the appropriate disposition and may consider evidence, in the form of testimony or documents, which may include:

1. The oral or written disposition reports of the parties;
2. Documents previously entered into evidence at prior proceedings;
3. Expert testimony or reports;
4. Documents agreed upon by the parties; and
5. Any other evidence admitted by the court.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. The court shall determine the appropriate case plan and shall:

1. Enter orders concerning appropriate services required to achieve the case plan;
2. Enter orders concerning the placement and custody of the child;
3. Set a review hearing within six (6) months and may set the initial permanency planning hearing;
4. Order concurrent planning if appropriate;
5. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend further proceedings without good cause shown and failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian**. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
6. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
7. Make findings and enter any other orders as may be appropriate or required by law.

## **COMMITTEE COMMENT.**

See comment to Rule 55.

### **RULE 57. Provision of Reunification Services Hearing.**

A. Notice of Intent. If the petitioner determines that no reunification services should be provided to the family, the petitioner shall file a notice of intent to discontinue reunification services and request that a hearing be set. If the determination is made prior to the disposition hearing, the request shall be filed no later than ten (10) days prior to the disposition hearing. The notice shall set forth specific facts in support of the request, including whether a statutory presumption exists that reunification services should not be provided.

B. Procedure. The court shall hear evidence concerning reunification services at the disposition hearing or set another hearing prior to entering final dispositional orders.

1. No later than ten (10) days prior to the disposition hearing or the hearing to discontinue reunification services, the petitioner shall provide to the court and the parties, the names and addresses of all professionals the petitioner has relied upon in determining that reunification efforts would not be reasonable; and
2. The court may consider evidence as set forth in Rule 56(D).

C. Findings and Orders. All findings shall be in writing, in the form of a minute entry or order. If the court finds that reunification services should continue, the court shall enter orders pursuant to Rule 56(E). If the court finds, by clear and convincing evidence, that reunification efforts would not be reasonable, the court shall:

1. Set forth the specific factual basis for its findings;
2. Order an appropriate case plan into effect and enter orders as necessary to achieve the case plan;
3. Enter orders concerning the placement and custody of the child;
4. Set an initial permanency hearing or a permanency hearing, as appropriate;

5. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend further proceedings without good cause shown may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian**. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings;
6. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act; **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
7. Enter any other orders as may be appropriate or required by law.

#### **RULE 58. Review Hearing.**

A. Purpose. The court shall conduct review hearings, as provided by law, in order to review the progress of the parties in achieving the case plan goals and determine whether the child continues to be dependent.

B. Reports. The petitioner shall provide a report to the court and the parties at least fifteen (15) days prior to the hearing which shall address:

1. The placement of the child;
2. The services being provided to the child and family;
3. The progress the parties have made in achieving the case plan goals; and
4. Whether the child continues to be dependent.

C. Contested Issues. Any party seeking an evidentiary hearing on any issue shall submit a request that the matter be set for a contested hearing. The request shall identify the issues to be litigated, the names and addresses of all witnesses and the estimated time the parties will need to present evidence. The court may reset the matter or proceed with the hearing as scheduled.

D. Procedure.

1. Absent any objection by a party, the court may consider the oral or written reports of the parties, documents previously entered into evidence at prior proceedings, documents agreed upon by the parties and any other reports, pursuant to Rule 45; and
2. All documents which the parties wish the court to consider as evidence shall be marked and admitted prior to the conclusion of the hearing.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. At the conclusion of the hearing, the court shall:

1. Dismiss the petition and return the child to the parent, guardian **or Indian custodian** if the court finds the child is not dependent; or
2. Make specific findings of fact that the child continues to be dependent; and
3. Enter appropriate orders concerning placement and custody of the child and services to be provided to the family;
4. Set a review hearing within the time as provided by law;
5. Set an initial permanency hearing not more than twelve (12) months from the date the child was removed from the home;
6. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend further proceedings without good cause shown and failure to participate in reunification services, if appropriate, may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian**. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
7. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and

8. Make findings and enter any other orders as may be appropriate or required by law.

### **RULE 59. Initial Permanency Hearing.**

A. Purpose. At the initial permanency hearing, the court shall determine whether the child can be returned to the parent, guardian **or Indian custodian** without a substantial risk of harm to the child's physical, mental or emotional health or safety and whether a hearing must be held to determine the appropriate permanent plan for the child.

B. Time Limits. The initial permanency hearing shall be held no later than twelve (12) months after the child's removal from the home. The hearing may be continued not more than thirty (30) days upon a showing of extraordinary circumstances.

C. Reports. The petitioner shall file a report with the court, not less than thirty (30) days prior to the initial permanency hearing and shall provide copies to all parties. The report shall address the following:

1. The current case plan and goals of the case plan;
2. The parent, guardian **or Indian custodian's** compliance with the case plan;
3. The petitioner's opinion as to whether or not the child can be returned to the parent, guardian **or Indian custodian** without a substantial risk of harm; and
4. Any proposed changes to the case plan and the goals to achieve the proposed case plan.

D. Procedure. The court shall consider evidence from the parties, in the form of testimony or documents admitted into evidence, which may include hearsay, in whole or in part, to determine whether the child can be returned to the parent, guardian **or Indian custodian**. The court may also consider evidence regarding the parent, guardian **or Indian custodian's** compliance with a case plan approved by the court.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. The court shall:

1. Dismiss the dependency petition if the court determines the child is no longer dependent;  
or

2. Return the child to the parent, guardian **or Indian custodian** if the court finds, by a preponderance of the evidence, that the return of the child would not create a substantial risk of harm to the child's physical, mental or emotional health or safety; and
3. Set a permanency hearing within one hundred and twenty (120) days if the child is not returned to the parent, guardian **or Indian custodian** and order the petitioner to finalize a permanent plan if the child is in the custody of the Department of Economic Security;
4. Set a review hearing within the time as provided by law;
5. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend further proceedings without good cause shown and failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian**. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
6. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
7. Make findings and enter any other orders as may be appropriate or required by law.

F. Consolidation of Hearings.

1. On motion of any party, or the court's own motion, the court may order that a motion or petition to terminate parental rights or to establish a permanent guardianship be filed within ten (10) days following the initial permanency hearing and consolidate the permanency hearing and the termination or guardianship hearing if all of the following are true:
  - a. The child was removed from the custody of the parent, guardian **or Indian custodian**;
  - b. The parent, guardian **or Indian custodian** has been offered reunification services;

- c. The child is not returned to the parent, guardian **or Indian custodian** at the initial permanency hearing; and
  - d. A party is requesting the termination of parental rights or the establishment of a permanent guardianship.
2. If the court orders consolidation of the permanency hearing and the termination or guardianship hearing, the court shall set a date for the initial hearing on the termination or guardianship motion within thirty (30) days after the initial permanency hearing. The court may also order that a pretrial conference be held at the initial termination or guardianship hearing. If the court set a date for the consolidated permanency hearing and termination or guardianship trial, the trial shall be held not more than one hundred and twenty (120) days after the initial permanency hearing.

#### **RULE 60. Permanency Hearing.**

A. Purpose. At the permanency hearing the court shall determine the appropriate permanent plan for the child and shall enter such orders as may be necessary to accomplish the plan within a specific time frame.

B. Time Limits. The permanency hearing shall be held:

- 1. Within thirty (30) days of the disposition hearing, if the court did not order reunification services; or
- 2. At the time set by the court at the initial permanency hearing, not to exceed one hundred and twenty (120) days after the initial permanency hearing.

C. Procedure. At the permanency hearing the court shall consider evidence from the parties, in the form of testimony or documents admitted into evidence, which may include hearsay, in whole or in part, in order to determine what permanent legal status is appropriate for the child. The court shall consider the final plan prepared by the Department of Economic Security, pursuant to prior order of the court.

D. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. The court shall make findings based upon the evidence presented and shall:

1. Determine the appropriate permanent plan for the child and order the petitioner to accomplish the plan within a specific time frame;
2. Set a review hearing within the time required by law;
3. Order the petitioner or the child's attorney or guardian ad litem to file a motion or petition to termination of parental rights or to establish a permanent guardianship within ten (10) days after the permanency hearing if the court determines that termination of parental rights or the establishment of a permanent guardianship is clearly in the best interests of the child;
4. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to attend further proceedings without good cause shown and failure to participate in reunification services, if appropriate, may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian**. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings and participate in reunification services;
5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act; **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
6. Make findings and enter any other orders as may be appropriate or required by law.

#### **4. PERMANENT GUARDIANSHIP.**

##### **RULE 61. Motion, Notice of Hearing, Service of Process and Orders.**

A. Motion for Permanent Guardianship. If the court determines that the establishment of a permanent guardianship is in the best interests of a dependent child, the court shall order that a motion for guardianship be filed by the Department of Economic Security or by the child's attorney or guardian ad litem within ten (10) days of the permanency hearing. The motion shall contain all information required by law.

B. Notice of Hearing. A notice of hearing shall accompany the motion for permanent guardianship and shall advise the parent, guardian **or Indian custodian** of the location, date and time of the initial guardianship hearing. In addition to the information required by law, the notice of hearing shall advise the parent, guardian **or Indian custodian** that failure to appear without good cause shown may result in a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the motion for guardianship. The notice shall advise the parent, guardian **or Indian custodian** that the hearing may go forward in the absence of the parent, guardian **or Indian custodian** and may result in the establishment of a permanent guardianship based upon the record and evidence presented. In addition to service of the notice of hearing upon the parties, a copy of the notice of hearing shall also be provided to the following persons:

1. The child's current physical custodian;
2. Any foster parent with whom the child has resided within six (6) months prior to the date of the hearing;
3. The prospective guardian if the guardian is not the current physical custodian; and
4. Any other person the court orders to be provided with the notice of hearing.

C. Service. The motion for guardianship and notice of hearing shall be served by the moving party upon the parties pursuant to Rule 5(c), Ariz. R. Civ. Pro. **If the motion alleges or the court has reason to believe the child at issue is an Indian child as defined by the Indian Child Welfare Act, in addition to service of process as required by this rule, notification shall be given to the parent, Indian custodian and child's tribe. Notice shall be provided by registered mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, notice shall be given to the Secretary of the Interior by registered mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (20) additional days to prepare for the hearing if a request is made by the parent or Indian custodian or the tribe.**

1. **Waiver. The parent, Indian custodian or the child's tribe may waive the ten (10) day notice requirement for purposes of proceeding with the initial guardianship hearing within the time limit as provided by state law.**

D. Orders. Upon the filing of a motion for guardianship, the court shall order that the Arizona Department of Economic Security, an agency or a person designated as an officer of the court to conduct an investigation and prepare a report addressing whether the prospective guardian is a fit and proper person to become guardian of the child and whether it is in the best interests of the child to grant the guardianship. **If the child is an Indian child, the report shall address whether the prospective guardian falls within the placement preferences as required by the Act or whether good cause exists to deviate from the placement preferences.** A copy of the report shall be provided to the parties and the court ten (10) days prior to the initial guardianship hearing. The court may enter any other orders, pending the hearing, as the court determines to be in the best interests of the child.

#### **COMMITTEE COMMENT.**

The filing of a motion for permanent guardianship and service pursuant to Rule 5(c), Ariz. R. Civ. P. shall apply only to those guardianships filed on or after August 6, 1999. Cases filed prior to that date were governed by the provisions of A.R.S. 8-525 & 8-525.01 (Repealed).

#### **RULE 62. Initial Guardianship Hearing**

A. Purpose. At the initial guardianship hearing, the court shall determine whether service has been completed, whether notice of the hearing has been provided to those persons identified pursuant to Rule 61(B) **and the parent or Indian custodian and the child's tribe** and whether the parent, guardian **or Indian custodian** admits, denies or does not contest the allegations contained in the motion for guardianship.

B. Time Limits. If a motion for permanent guardianship is filed, the initial hearing shall be held within thirty (30) days of the permanency hearing.

C. Procedure. At the initial hearing the court shall;

1. Inquire if any party has reason to believe that the child at issue is subject to the Indian Child Welfare Act;
2. Appoint counsel pursuant to Rule 38(B), unless counsel had previously been appointed;
3. Appoint counsel for the child if a guardian ad litem has not been appointed;

4. Determine whether service of process has been completed or waived as to each party pursuant to Rule 61 and whether notice of the hearing has been provided to those persons identified in Rule 61(B), **in addition to the parent, Indian custodian and the child's tribe;**
5. Determine whether the investigation and report ordered by the court has been completed and provided to the parties;
6. Advise the parent, guardian **or Indian custodian** of their rights as follows:
  - a. The right to counsel, including court appointed counsel if the parent, guardian **or Indian custodian** is indigent;
  - b. The right to cross examine all witnesses who are called to testify against the parent, guardian **or Indian custodian;**
  - c. The right to trial by the court on the guardianship motion or petition; and
  - d. The right to use the process of the court to compel the attendance of witnesses.
7. Determine whether the parent, guardian **or Indian custodian** admits, denies or does not contest the allegations contained in the motion or petition for guardianship.
  - a. Admission /No Contest. If the parent, guardian **or Indian custodian** admits or does not contest the allegations, the court shall proceed with the guardianship adjudication hearing and enter findings and orders, pursuant to Rule 63.
  - b. Denial. If a motion for guardianship was filed and the parent, guardian **or Indian custodian** denies the allegations, the court shall set the matter for trial within ninety (90) days of the permanency hearing. The court may schedule a settlement conference, a pretrial conference or mediation, if appropriate.
  - c. Failure to Appear. If the parent, guardian **or Indian custodian** fails to appear at the initial guardianship hearing without good cause shown, and the court finds the parent, guardian **or Indian custodian** had notice of the hearing, was properly served pursuant to Rule 61, and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion, the court may proceed with the adjudication of guardianship based upon the

record and evidence presented if the moving party has proven grounds upon which to establish a guardianship. The court shall enter its findings and orders pursuant to Rule 63.

D. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. At the conclusion of the hearing, the court shall:

1. Enter findings as to notification and service upon the parties and those persons designated to receive notice and the court's jurisdiction over the subject matter and persons before the court;
2. Set a continued initial guardianship hearing as to any party who was not served and did not appear;
3. The court may schedule a settlement conference, status conference, pretrial conference or mediation as deemed appropriate;
4. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to appear at the guardianship adjudication hearing, without good cause shown, may result a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the motion for guardianship. The court shall advise the parent, guardian **or Indian custodian** that the guardianship adjudication hearing may go forward in the absence of the parent, guardian **or Indian custodian** and may result in the establishment of a permanent guardianship based upon the record and evidence presented. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings;
5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
6. Make findings and enter any other orders as may be appropriate or required by law.

#### COMMITTEE COMMENT.

It is the recommendation of the committee that, in addition to the admonition set forth in this rule, the court should consider providing the parent, guardian **or Indian custodian** with a separate written copy of the admonition in order to protect the due process rights of the parent, guardian **or Indian custodian**. See FORM II.

## **RULE 63. Guardianship Adjudication Hearing.**

A. Purpose. The court shall conduct the guardianship adjudication hearing for the purpose of determining whether the prospective guardian is a fit and proper person to become the permanent guardian of the child and whether guardianship is in the best interests of the child.

B. Time Limits. The guardianship adjudication hearing shall be set no later than ninety (90) days after the permanency hearing. The court may continue the hearing beyond the ninety (90) day time limit for a period of thirty (30) days if it finds that the continuance is necessary for the full, fair and proper presentation of evidence and the best interests of the child would not be adversely affected. Any continuance beyond thirty (30) days shall only be granted upon a finding of extraordinary circumstances. Extraordinary circumstances include but are not limited to acts or omissions that are unforeseen or unavoidable. Any party requesting a continuance shall file a motion for extension of time, setting forth the reasons why extraordinary circumstances exist. The motion shall be filed within five (5) days of the discovery that extraordinary circumstances exist. The court's finding of extraordinary circumstances shall be in writing and shall set forth the factual basis for the continuance.

C. Burden of Proof. The moving party has the burden of proving the allegations contained in the motion by clear and convincing evidence. **In addition, if the child is an Indian child, the moving party must prove, beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The petitioner must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.**

D. Procedure. The presentation of evidence at the guardianship adjudication hearing shall be as informal as the requirements of due process and fairness permit and shall generally proceed in a manner similar to the trial of a civil action before the court without a jury.

1. Admission/No Contest. The parent, guardian **or Indian custodian** may waive the right to trial on the allegations contained in the motion for guardianship by admitting or not contesting the allegations. An admission or plea of no contest may be oral or in writing. In accepting an admission or plea of no contest, the court shall:
  - a. Determine whether the party understands the rights being waived;
  - b. Determine whether the admission or plea of no contest is knowingly, intelligently and voluntarily made;

c. Determine whether a factual basis exists to support the establishment of a guardianship; and

d. Proceed with entering the findings and orders as set forth in subsection (F) of this rule.

2. Failure to Appear. If the court finds the parent, guardian **or Indian custodian** failed to appear at the guardianship adjudication hearing without good cause shown, had notice of the hearing, was properly served pursuant to Rule 61 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion, the court may grant the guardianship based upon the record and evidence presented if the moving party has proven grounds upon which to establish a guardianship. The court shall enter its findings and orders pursuant to subsection (F) of this rule.

3. The court shall give primary consideration to the physical, mental and emotional needs of the child in determining whether to grant the motion for guardianship and shall appoint as guardian the person nominated as guardian by a child fourteen (14) years of age or older, unless the court finds it would not be in the child's best interest to do so.

E. Reports. In addition to reports admitted into evidence pursuant to Rule 45, the court shall admit into evidence and consider the investigative report prepared pursuant to Rule 61(D).

F. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. At the conclusion of the hearing the court shall:

1. Enter findings as to the court's jurisdiction over the subject matter and person before the court;

2. If the moving party has met its burden of proof, as provided by law, the court shall:

a. Make specific findings of fact in support of the establishment of a guardianship and appoint a permanent guardian;

b. Enter appropriate orders governing the powers and duties of the guardian as set forth in A.R.S. 14-5209;

c. Enter appropriate visitation orders. The court may order the parent to contribute to the support of the child, if appropriate; and

- d. Set an annual review and order the preparation of a report, as required by law; and dismiss the dependency action.
3. If the moving party fails to meet the burden of proof, the court shall deny the guardianship motion, set a review hearing and order the parties to submit a revised case plan prior to the hearing;
4. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
5. Make findings and enter any other orders as may be appropriate or required by law.

#### **COMMITTEE COMMENT.**

**Although the Indian Child Welfare Act does not specifically reference guardianship proceedings, affording the Indian parent the same protections afforded in termination of parental rights proceedings is consistent with the intent of the Act. While states are required to comply with the requirements of the Act, there is nothing to preclude states from affording Indian families greater protection than that provided by the Act.**

## **5. TERMINATION OF PARENTAL RIGHTS.**

### **RULE 64. Motion, Petition, Notice of Hearing and Service of Process and Orders.**

A. Motion for Termination of Parental Rights. If the court determines that termination of parental rights is in the best interests of a dependent child, the court shall order that a motion for termination of parental rights be filed by the Department of Economic Security or the child's attorney or guardian ad litem within ten (10) days of the permanency hearing. The motion shall allege the grounds for termination of parental rights as provided by law **and shall state whether the child is an Indian child as defined by the Indian Child Welfare Act.**

B. Petition for Termination of Parental Rights. If the child at issue is not a dependent child or is a dependent child who was the subject of a dependency petition filed prior to July 1, 1998, the petitioner shall file a petition for termination of parental rights, pursuant to A.R.S. 8-534 **and**

**shall state whether the child is an Indian child as defined by the Indian Child Welfare Act.**

Nothing in this rule shall preclude the filing of a petition in those cases where the child was the subject of a dependency petition filed after July 1, 1998.

C. Notice of Hearing. A notice of hearing shall accompany the motion or petition for termination of parental rights and shall advise the parent, guardian **or Indian custodian** of the location, date and time of the initial termination hearing. In addition to the information required by law, the notice of hearing shall advise the parent, guardian **or Indian custodian** that failure to appear at the initial hearing, pretrial conference, status conference or termination adjudication hearing, without good cause, may result in a finding that the parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the motion or petition for termination. The notice shall advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian** and may result in the termination of parental rights based upon the record and evidence presented.

D. Service. **If the motion or petition alleges or the court has reason to believe the child at issue is an Indian child as defined by the Indian Child Welfare Act, in addition to service of process as required by this rule, notification shall be given to the parent, Indian custodian and the child's tribe. Notice shall be provided by registered mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, notice shall be given to the Secretary of the Interior by registered mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (20) additional days to prepare for the hearing if a request is made by the parent or Indian custodian or the tribe.**

1. **Waiver. The parent, Indian custodian or the child's tribe may waive the ten (10) day notice requirement for purposes of proceeding with the initial termination hearing within the time limit as provided by state law.**
2. Motion. The motion for termination and notice of hearing shall be served by the moving party upon the parties pursuant to Rule 5(c), Ariz. R. Civ. P. at least ten (10) days prior to the initial termination hearing.
3. Petition. The petition for termination of parental rights and notice of hearing shall be served by the petitioner upon the parties, pursuant to A.R.S. 8-535, in the manner provided for in Rules 4.1 or 4.2, Ariz. R. Civ. P.

E. Orders. The court may enter orders, pending the hearing, as the court determines to be in the best interests of the child.

### **RULE 65. Initial Termination Hearing.**

A. Purpose. At the initial termination hearing, the court shall determine whether service has been completed and whether the parent, guardian **or Indian custodian** admits, denies or does not contest the allegations contained in the motion or petition for termination of parental rights.

B. Time Limits. If a motion for termination of parental rights is filed, the initial hearing shall be held within thirty (30) days of the permanency hearing. If a petition for termination is filed, the hearing shall be held no sooner than ten (10) days following the completion of service.

C. Procedure. At the initial hearing the court shall:

1. Inquire if any party has reason to believe that the child at issue is subject to the Indian Child Welfare Act;
2. Appoint counsel pursuant to Rule 38(B); unless counsel had previously been appointed;
3. Appoint counsel for the child if a guardian ad litem has not been appointed;
4. Determine whether service of process has been completed, pursuant to Rule 64 or waived as to each party;
5. Advise the parent, guardian **or Indian custodian** of their rights as follows:
  - a. The right to counsel, including court appointed counsel if the parent, guardian **or Indian custodian** is indigent;
  - b. The right to cross examine all witnesses who are called to testify against the parent, guardian **or Indian custodian**;
  - c. The right to trial by the court on the termination motion or petition; and
  - d. The right to use the process of the court to compel the attendance of witnesses.

6. Determine whether the parent, guardian **or Indian custodian** admits, denies or does not contest the allegations contained in the motion or petition to terminate parental rights.
  - a. Admission /No Contest. If the parent, guardian **or Indian custodian** admits or does not contest the allegations, the court shall proceed with the termination hearing and enter findings and orders, pursuant to Rule 66.
  - b. Denial. If a motion for termination of parental rights was filed and the parent, guardian **or Indian custodian** denies the allegations, the court shall set the matter for trial within ninety (90) days of the permanency hearing. The court may schedule a settlement conference, a pretrial conference or mediation, if appropriate. If a petition for termination was filed, the court may schedule mediation and shall set a pretrial conference or status conference.
  - c. Failure to Appear. If the parent, guardian **or Indian custodian** fails to appear at the initial termination hearing without good cause shown and the court finds the parent, guardian **or Indian custodian** had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the termination motion or petition, the court may proceed with the adjudication of termination based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights. The court shall enter its findings and orders pursuant to Rule 66.

D. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. At the conclusion of the hearing, the court shall:

1. Enter findings as to notification and service upon the parties and the court's jurisdiction over the subject matter and persons before the court;
2. Set a continued initial termination hearing as to any party who was not served and did not appear;
3. Address the parent, guardian **or Indian custodian** in open court and advise the parent, guardian **or Indian custodian** that failure to appear at the pretrial conference, status conference or termination adjudication hearing, without good cause shown, may result in a finding that parent, guardian **or Indian custodian** has waived legal rights and is deemed to have admitted the allegations in the motion or petition for termination. The court shall

advise the parent, guardian **or Indian custodian** that the hearings may go forward in the absence of the parent, guardian **or Indian custodian** and may result in the termination of parental rights based upon the record and evidence presented. The court shall make specific findings that it advised the parent, guardian **or Indian custodian** of the consequences of failure to attend subsequent proceedings;

4. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences**; and
5. Make findings and enter any other orders as may be appropriate or required by law.

#### **COMMITTEE COMMENT.**

It is the recommendation of the committee that, in addition to the admonition set forth in this rule, the court should consider providing the parent, guardian **or Indian custodian** with a written copy of the admonition in order to protect the due process rights of the parent, guardian **or Indian custodian**. See FORM III.

#### **RULE 66. Termination Adjudication Hearing.**

A. Purpose. The court shall conduct the termination adjudication hearing for the purpose of determining whether the moving party or petitioner has met the burden of proving grounds upon which to terminate parental rights and whether termination is in the best interests of the child.

B. Time Limits. If a motion for termination of parental rights was filed, the termination adjudication hearing shall be held no later than ninety (90) days after the permanency hearing. The court may continue the hearing beyond the ninety (90) day time limit for a period thirty (30) days if it finds that the continuance is necessary for the full, fair and proper presentation of evidence, and the best interests of the child would not be adversely affected. Any continuance beyond thirty (30) days shall only be granted upon a finding of extraordinary circumstances. Extraordinary circumstances include, but are not limited to, acts or omissions that are unforeseen or unavoidable. Any party requesting a continuance shall file a motion for extension of time, setting forth the reasons why extraordinary circumstances exist. The motion shall be filed within five (5) days of the discovery that extraordinary circumstances exist. The court's finding of extraordinary circumstances shall be in writing and shall set forth the factual basis for the continuance.

C. Burden of Proof. The moving party or petitioner has the burden of proving the allegations contained in the motion or petition by clear and convincing evidence. **In addition, if the child is an Indian child, the moving party or petitioner must also prove, beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The petitioner must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.**

D. Procedure. The presentation of evidence at the termination adjudication hearing shall be as informal as the requirements of due process and fairness permit and shall generally proceed in a manner similar to the trial of a civil action before the court without a jury.

1. Admission/No Contest. The parent, guardian **or Indian custodian** may waive the right to trial on the allegations contained in the motion or petition for termination of parental rights by admitting or not contesting the allegations. An admission or plea of no contest may be oral or in writing. In accepting an admission or plea of no contest, the court shall:
  - a. Determine whether the party understands the rights being waived;
  - b. Determine whether the admission or plea of no contest is knowingly, intelligently and voluntarily made;
  - c. Determine whether a factual basis exists to support the termination of parental rights; and
  - d. Proceed with entering the findings and orders as set forth in subsection (E) of this rule.
2. Failure to Appear. If the court finds the parent, guardian **or Indian custodian** failed to appear at the termination adjudication hearing without good cause shown, had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian **or Indian custodian** and that failure to appear may constitute a waiver of rights and an admission to the allegation contained in the motion or petition for termination, the court may terminate parental rights based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights. The court shall enter its findings and orders pursuant to subsection (E) of this rule.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of a minute entry or order. At the conclusion of the hearing the court shall:

1. Enter findings as to the court's jurisdiction over the subject matter and person before the court;
2. If the moving party or petitioner has met its burden of proof, as provided by law, the court shall:
  - a. Make specific findings of fact in support of the termination of parental rights and grant the motion or petition for termination;
  - b. Appoint a guardian for the child or appoint a guardian for the child and vest legal custody in another person or authorized agency;
  - c. Enter orders for financial support of the child;
  - d. Set or reaffirm the dependency review hearing; and
  - e. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences.**
3. Deny the termination motion or petition if the moving party or petitioner did not meet its burden of proof and order the parties to submit a revised case plan prior to the dependency review hearing.

## FORM I.

### Notice to Parent in Dependency Action

(To be given to parent at each dependency hearing prior to adjudication and noted on the record)

You are a party in a dependency case. If the court determines that your child is dependent, then this Court will make decisions about the care and custody of your child until you demonstrate that you are able to do so.

If you cannot be re-united with your child within legal time-frames, your parental rights may be terminated and your child may be adopted, or a permanent guardian may be appointed for your child.

As a parent **or Indian custodian** in a dependency case, your legal rights include:

- 1.The right to counsel, including court appointed counsel if you are indigent;
- 2.The right to cross-examine witnesses who are called to testify against you;
- 3.The right to trial by the court on the allegations in the dependency petition; and
- 4.The right to use the process of the court to compel the attendance of witnesses.

As part of this case, there will be several court hearings. You are required to appear for all court hearings. If you cannot attend a court hearing, you must prove to the court that you did not appear for good cause. If you fail to appear without good cause for the Pre-trial Conference, Settlement Conference or Dependency Adjudication, the court may determine that you have waived your legal rights, admitted the allegations of dependency in the petition and may rule that your child is dependent based on the record and evidence presented.

You must also actively participate in reunification services if they are offered to you. If you do not participate in reunification services, your parental rights may be terminated or a permanent guardian may be appointed for your child.

It will be presumed that you understand the contents of this notice unless you tell the court at today's hearing that you do not understand this notice.

Next hearing type: \_\_\_\_\_,

Date: \_\_\_\_\_, Time: \_\_\_\_\_,

Judicial Officer: \_\_\_\_\_,

Address of court facility: \_\_\_\_\_

## FORM II.

### Notice to Parent in Guardianship Action

(To be given to parent at permanency hearing if guardianship is ordered  
and each subsequent hearing until guardianship adjudication and noted on the record)

If you cannot be re-united with your child within legal time frames, your parental rights may be terminated and your child may be adopted, or a permanent guardian may be appointed for your child.

As a parent **or Indian custodian**, your legal rights include:

- 1.The right to counsel, including court appointed counsel if you are indigent;
- 2.The right to cross-examine witnesses who are called to testify against you;
- 3.The right to trial by the court on the allegations in the guardianship motion; and
- 4.The right to use the process of the court to compel the attendance of witnesses.

You are required to appear for all guardianship hearings. If you cannot attend a court hearing, you must prove to the court that you did not appear for good cause. If you fail to appear without good cause for the Guardianship Pre-trial Conference, Settlement Conference or Guardianship Adjudication, the court may determine that you have waived your legal rights, admitted the legal basis for the motion for guardianship and the court may establish a guardianship for your child based on the record and evidence presented.

It will be presumed that you understand the contents of this notice unless you tell the court at today's hearing that you do not understand this notice.

Next hearing type: \_\_\_\_\_,

Date: \_\_\_\_\_, Time: \_\_\_\_\_,

Judicial Officer: \_\_\_\_\_,

Address of court facility: \_\_\_\_\_

## FORM III.

### Notice to Parent in Termination Action

(To be given to parent at permanency hearing if termination is ordered  
and each subsequent hearing until termination adjudication and noted on the record)

If you cannot be re-united with your child within legal time frames, your parental rights may be terminated and your child may be adopted, or a permanent guardian may be appointed for your child.

As a parent **or Indian custodian**, your legal rights include:

- 1.The right to counsel, including court appointed counsel if you are indigent;
- 2.The right to cross-examine witnesses who are called to testify against you;
- 3.The right to trial by the court on the allegations in the termination motion/petition; and
- 4.The right to use the process of the court to compel the attendance of witnesses.

You are required to appear for all termination hearings. If you cannot attend a court hearing, you must prove to the court that you did not appear for good cause.

If you fail to appear without good cause for the Termination Pre-trial Conference, Termination Settlement Conference or Termination Adjudication, the court may determine that you have waived your legal rights, admitted the grounds alleged in the motion/petition for termination and may terminate your parental rights to your child based on the record and evidence presented.

It will be presumed that you understand the contents of this notice unless you tell the court at today's hearing that you do not understand this notice.

Next hearing type: \_\_\_\_\_,

Date: \_\_\_\_\_, Time: \_\_\_\_\_,

Judicial Officer: \_\_\_\_\_,

Address of court facility: \_\_\_\_\_

## **PART IV. ADOPTION**

### **1. SCOPE OF RULES.**

#### **RULE 67. Scope of Rules.**

These rules govern procedures in adoption matters and should be interpreted in a manner designed to protect the best interests of the child, giving paramount consideration to the health and safety of the child.

### **2. GENERAL ADOPTION PROVISIONS.**

#### **RULE 68. Definitions.**

##### **A. Definitions.**

1. Parent. The term parent means the birth parent whose parental rights have not been terminated or the adoptive parent of a child for whom a final adoption decree has been issued.
2. Parties. Parties include the prospective adoptive parent, the person to be adopted, the parent of the person to be adopted, any person or entity whose consent is required in order to effectuate an adoption and any other person or entity who has been permitted by the court to intervene in the proceedings pursuant to Rule 24, Ariz. R. Civ. Pro. or the Indian Child Welfare Act.
3. Investigative Report. The investigative report shall include the following:
  - a. A home study;
  - b. The application for certification to adopt which shall be accompanied by fingerprint clearances, or an affidavit that the applicant and each adult living in the applicant's home have been fingerprinted and shall indicate the date the fingerprints were submitted

for processing. The application shall identify all adults living in the applicant's home who are subject to fingerprinting. The application shall further advise whether the applicant currently has temporary custody of the child and the expiration date of the custody order; and

- c. A check of records through the Child Protective Services Central Registry to determine whether the applicants or any adult living in the applicant's home are listed on the registry.

#### **B. Definitions Pursuant to the Indian Child Welfare Act.**

- 1. Parent.** The term parent means any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.
- 2. Indian Child.** The term Indian child means any unmarried person under the age of eighteen (18) and who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe.
- 3. Indian Child's Tribe.** The term Indian child's tribe means the Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.
- 4. Indian Custodian.** The Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody and control has been transferred by the parent of the child.
- 5. Indian Tribe.** Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c).
- 6. Extended Family Member.** The term extended family member means a person as defined by law or custom of the Indian child's tribe, or, in the absence of such law or custom, means a person who has reached the age of eighteen (18) and who is the Indian child's grandparent, aunt or uncle, sister or brother, sister-in-law or brother-in-law, niece or nephew, first or second cousin, or step-parent.

- 7. Preadoptive or Foster Care Placement Preferences.** Any preadoptive placement of an Indian child shall be in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child shall be placed within a reasonable proximity to the child's home, taking into account any special needs of the child. In the absence of good cause to the contrary, preference shall be given to the following placements:
- a. A member of the Indian child's extended family;**
  - b. A foster home licensed, approved or specified by the Indian child's tribe;**
  - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or**
  - d. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.**
- 8. Adoptive Placement Preferences.** In any adoptive placement of an Indian child, a preference shall be given, in the absence of good cause to the contrary, to a placement with:
- a. A member of the Indian child's extended family;**
  - b. Other members of the Indian child's tribe; or**
  - c. Other Indian families.**

**RULE 69. Appointment, Appearance and Withdrawal of Counsel.**

A. Appointment. The court may appoint counsel for those persons entitled to counsel and determined to be indigent, as provided by law. In determining whether a person is indigent, the court shall:

1. Order the person to provide proof of financial resources by filing a financial questionnaire provided by the court. The court may question the person under oath. If the court determines the person is not indigent the court may order the person to pay a reasonable portion of the cost of counsel or deny the request for appointment of counsel.

B. Appearance. Counsel shall enter an initial appearance by appearing personally before the court and advising the court that counsel is representing a party or by filing a written notice of appearance with the clerk of the court and providing copies to the assigned judge and all parties.

C. Manner of Appointment. If the court enters an order appointing or denying counsel, a copy of the order or minute entry shall be provided to the parties.

D. Withdrawal of Counsel. Requests to withdraw as counsel shall be in writing, unless otherwise authorized by the court, and shall be provided to the parties.

#### **RULE 70. Appointment of Guardian Ad Litem.**

A. The court may appoint a guardian ad litem to protect the interest of the child. The guardian ad litem may be an attorney, volunteer special advocate or other qualified person.

B. In any proceeding where a parent, guardian **or Indian custodian** is under eighteen (18) years of age, the court may appoint a guardian ad litem to protect the interests of such parent, guardian **or Indian custodian**.

C. If the court has reason to believe a parent, guardian **or Indian custodian** may be incompetent, the court shall appoint a guardian ad litem to conduct an investigation and report to the court as to whether the parent, guardian **or Indian custodian** may be incompetent and in need of protection. The court shall conduct hearings and enter orders as determined to be necessary to protect the interests of the parent, guardian **or Indian custodian**.

#### **RULE 71. Telephonic Testimony, Video Conferencing.**

Upon the courts own motion or motion by a party, the court may permit telephonic testimony or argument or video conferencing in any proceeding pursuant to these rules. The motion shall be in writing pursuant to Rule 74, unless otherwise authorized by the court.

#### **RULE 72. Computation of Time.**

Unless otherwise stated in these rules, time shall be computed in accordance with Rule 6, Ariz. R. Civ. P.

## **RULE 73. Disclosure and Discovery**

A. Scope of Disclosure. Disclosure shall include, but is not limited to the following:

1. Reports prepared by or at the request of any party;
2. Reports of any social service provider;
3. Foster Care Review Board and Court Appointed Special Advocate reports;
4. Transcripts of interviews and prior testimony;
5. Probation reports;
6. Photographs;
7. Physical evidence;
8. Records of prior criminal convictions;
9. Medical and psychological records and reports;
10. Results of medical or other diagnostic tests; and
11. Any other information relevant to the proceedings.

B. Time Limits for Disclosure. Unless otherwise ordered by the court, the parties shall disclose to each other and the court the following information prior to a contested hearing:

1. The uncontested facts deemed material;
2. The contested issues of fact and law which may be material or applicable;
3. A statement of other issues of fact or law which the party believes to be material;
4. A list of the witnesses which the party intends to call at trial, which shall include the names, addresses and telephone numbers of the witnesses in addition to a description of the substance of the witness' expected testimony. No witness shall be called at trial other than those disclosed in accordance with this rule, except for good cause shown. Witnesses whose testimony will be offered in the form of a deposition shall be noted; and

5. A list of and copies of all exhibits which the party intends to use at trial. If a party objects to the admission of an exhibit, the party shall file a notice of objection and the specific grounds for each objection and provide a copy of the notice to all parties and the court within ten (10) days of receipt of the exhibit. Specific objections or grounds not listed in the disclosure statement shall be deemed waived, unless otherwise ordered by the court. No exhibits shall be used at trial other than those disclosed in accordance with this rule, except for good cause shown.

D. Methods of Discovery. The parties may utilize methods of discovery as set forth in Rules 26-37, Ariz. R. Civ. P., upon the agreement of the parties. Absent such agreement, the party seeking to utilize such methods of discovery shall file a motion with the court requesting authorization to proceed and shall set forth the reasons why such methods are necessary.

E. Sanctions. Upon motion of a party or the court's own motion, the court may impose sanctions upon a party who fails to disclose information in its possession which is subject to disclosure or fails to disclose such information in a timely manner as required by this rule. Sanctions may include precluding the evidence, granting a continuance or entering any order against a party as deemed appropriate. Any sanction imposed should be in accordance with the intent of these rules, as set forth in Rule 67.

#### **RULE 74. Motions.**

A. Form. All motions shall be in writing, unless otherwise authorized by the court, and shall set forth the basis for the relief sought. The party filing the motion shall state whether there are any responding parties, the positions of the parties as to the issues raised in the motion and the efforts made to reach the other parties if their positions are not known.

B. Filing. All motions shall be filed with the clerk of the court and copies provided to the assigned judge at the time of filing. If no judge has been assigned to the matter, a copy of the motion shall be provided to the court administrator. All parties shall be served copies by mail, hand delivery, fax or by electronic means.

C. Response. All responses to a motion shall be filed within five (5) days of service of the motion by hand delivered, fax or by electronic means. Service shall be deemed completed upon receipt if served by hand delivery, fax or by electronic means. If the motion is served by mail, a response is due within ten (10) days of service by mail. No reply shall be filed unless authorized by the court.

The court may rule on the motion, with or without a hearing, if the motion states there is no objection, no responding party or the time for filing an objection has expired. For cause shown, the court may at any time, with or without motion or notice, enlarge or reduce time frames if the request is made before the expiration of the originally prescribed period, or as extended by prior order.

D. Form of Order. Where appropriate, motions shall be accompanied by a proposed form of order and include with it copies to be conformed, together with envelopes stamped and addressed to each party.

E. Motion to Set Aside Judgment. A motion to set aside a judgment rendered by the court shall conform to the requirements of Rule 60(c), Ariz. R. Civ. P., except that the motion shall be filed within one (1) year of the final judgment, order or proceeding unless the moving party alleges grounds pursuant to Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within six (6) months.

F. Motion to Continue. Any motion to continue shall be made in good faith and shall state with specificity the reasons for the continuance. The party requesting the continuance shall advise the court of impending expiration of time limits. Motions to continue shall only be granted only upon a showing of good cause.

#### **RULE 75. Release of Information.**

All records pertaining to adoption proceedings shall be maintained as confidential and shall be withheld from public inspection except upon order of the court or as otherwise provided by law.

#### **RULE 76. Service of Process.**

A. Service of Process. Service of process shall be accomplished pursuant to Rule 4.1 and 4.2, Ariz.R.Civ.P., unless otherwise set forth in these rules.

**B. Notice. If the petition to adopt alleges or the court has reason to believe the child at issue is an Indian child as defined by the Indian Child Welfare Act, in addition to service of process as required by these rules, notification shall be given to the parent, Indian custodian and child's tribe of any involuntary proceeding involving an Indian child. Notice shall be provided by registered mail with return receipt requested. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the Secretary of the Interior by registered mail and the Secretary of the Interior shall have**

**fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (20) additional days to prepare for the hearing if a request is made by the parent or Indian custodian or the tribe.**

### **3. CERTIFICATION.**

#### **RULE 77. Certification To Adopt.**

A. Dismissal of Application. If the court is unable to certify the applicant as acceptable to adopt a child due to lack of information as required by law, the court shall dismiss the application for certification. If the applicant submits a subsequent request to be certified the court may, in its discretion, consider information contained in the original request for certification.

B. Denial of Certification. If the court determines the applicant is not acceptable to adopt, the court shall notify the applicant and the person, division or agency responsible for preparing the certification report of the court's determination and shall advise the applicant of the right to a hearing on the denial of certification.

C. Motion for Reconsideration of Denial of Certification. Any applicant who is determined to be unacceptable to adopt may file a motion with the court, pursuant to Rule 74, requesting a hearing on the denial of certification. Upon receipt of the motion, the court shall set an evidentiary hearing within sixty (60) days of the request and shall notify the applicant and the person, division or agency responsible for preparing the certification report, of the location, date and time of the hearing as well as the reason for denial of certification.

1. Time Limits. The motion shall be filed within thirty (30) days of the issuance of the minute entry or order denying certification.

D. Pretrial Conference. Upon request of a party or upon its own motion, the court may set a pretrial conference.

E. Discovery. The applicant may obtain a copy of the information contained in the court's file as prescribed by law. Prior to release of the file, the results of the criminal background check, information obtained from child protective services records and information provided by references, other than their names, shall be redacted.

F. Burden of Proof. The burden shall be on the applicant or any other party ordered by the court to present evidence of acceptability to adopt.

G. Procedure. The hearing shall be informal in nature, and the court may consider all reliable evidence, including hearsay. All documents the parties wish the court to consider shall be marked and entered into evidence. The court may continue the hearing upon motion of a party for good cause.

H. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. At the conclusion of the hearing the court shall make specific findings of fact as to the applicant's acceptability to adopt, based upon the evidence presented. The court shall advise the applicant of their right to appeal an adverse ruling.

### **RULE 78. Temporary Custody.**

A. Petition for Temporary Custody. A person seeking temporary custody of child shall file a petition and a notice of hearing with the clerk of the court. The petition shall set forth how the child came into the prospective adoptive parent's care, how long the child has resided with the prospective adoptive parent, why continued custody is in the best interests of the child and whether the child is subject to the Indian Child Welfare Act.

B. Notice of Hearing. A notice of hearing shall accompany the petition and shall set forth the location, date and time of the hearing and shall require the attendance of the prospective adoptive parent, the child and the person, division or agency responsible for preparing reports for the court if the prospective adoptive parent is not certified to adopt, unless waived by the court.

C. Service. The petition and notice of hearing shall be served by the person seeking custody in any manner reasonably designed to ensure the attendance of the parties at the hearing and may include faxed, electronic or telephonic notice. In addition to service as required by this rule, if an Indian child is the subject of the temporary custody order, and the child was not placed voluntarily by the parent or Indian custodian, the child's tribe shall be notified of the hearing pursuant to Rule 76B.

D. Procedure. Upon receipt of the petition, the court shall set a hearing which may be waived by the court upon a showing of good cause. The court shall determine whether continued custody by the prospective adoptive parent is in the child's best interests.

1. Attendance. The prospective adoptive parent, the child and any person, representative of the division or agency responsible for preparing reports for the court shall attend the hearing, unless waived by the court.

2. Granting of Custody. If the court grants temporary custody, the court shall order that an application for certification to adopt be filed with the court within thirty (30) days of the granting of temporary custody of the child to the prospective adoptive parent if the person is not certified to adopt. If no person or representative of the division or agency has been identified to prepare reports for the court, the court shall set a status hearing within thirty (30) days to determine the status of the certification.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. The court shall:

1. Grant or deny the petitioner's request for temporary custody; and
2. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, **including whether placement of the Indian child is in accordance with the Act or whether there is good cause to deviate from the preferences.**

F. Expiration of Custody Order. The order granting temporary custody of a child to the prospective adoptive parent shall expire six (6) months after issuance. Prior to the expiration of the temporary custody order the court shall set a status hearing on the custody order to determine whether the prospective adoptive parent has been certified and has filed a petition to adopt. The court may extend the temporary custody order upon a showing of good cause.

1. Status Hearing. The court may waive the attendance of the parties at the status hearing if the court has sufficient information to determine whether the prospective adoptive parent is proceeding with the adoption in a timely manner. The court may vacate the hearing upon the filing of a petition to adopt.

G. Revocation of Temporary Custody. The court may rescind a temporary custody order prior to the date of expiration for good cause. Notice and an opportunity to be heard shall be provided to the prospective adoptive parent and any agency or the division having placed the child.

#### **COMMITTEE COMMENT.**

It was the opinion of the Committee that procedures should exist to ensure that once temporary custody is granted, the prospective adoptive parent follow through with the certification and adoption process. By requiring the attendance of the person, division or agency responsible for preparing reports for the court, such as the certification report or home study, those entities provide an additional safeguard. There may be circumstances where a hearing is not required if it appears to the court that the prospective adoptive parent has substantially completed the certification process

but requires a temporary custody order for the purpose of obtaining insurance coverage for the child or in order to travel with the child. Pursuant to this rule, the court could issue the temporary custody order in the absence of a hearing.

#### **4. ADOPTION.**

##### **RULE 79. Petition to Adopt.**

A. Petition to Adopt. The petition to adopt and notice of hearing shall be filed with the clerk of the court. A petition to adopt shall be captioned, "In the Matter of \_\_\_\_\_, a person under the age of 18 years," and may be based upon information and belief. In addition to information required by law, each petition to adopt shall contain the following information:

1. Whether the child to be adopted is an Indian child subject to the requirements of the Indian Child Welfare Act. If the Act applies, the petition shall include the following:
  - a. Whether the placement preferences required by the Act have been complied with;
  - b. The name of the Indian child's tribe, if known;
  - c. Whether the Indian child is reasonably believed to be a resident or domiciliary of an Indian reservation; and
  - d. Whether the Indian child is a ward of a tribal court;
2. Whether all necessary consents have been obtained, noting any exceptions as provided by law;
3. Whether any termination of parental rights proceeding is pending, including any appeal; and
4. Whether approval has been granted through the Interstate Compact on the Placement of Children, if applicable.

B. Notice of Hearing. A notice of hearing shall accompany the petition and shall advise the parties as to the date, time and location of the hearing. If the child is an Indian child, in addition to service as required by this rule, the child's parent or Indian custodian and the child's tribe shall be notified pursuant to Rule 76(B) if the parent or Indian custodian did not voluntarily place the Indian child for adoption.

C. Service. A petition to adopt and notice of hearing shall be served by the petitioner, pursuant to Rule 76, upon the following persons:

1. The petitioner;
2. The person, division or agency conducting the social study;
3. Any person, division or agency required by law to give consent unless consent and a waiver of notice has been filed previously with the court; and
4. Any person who has initiated a paternity action as provided by law.

#### **RULE 80. Birth Parent Living Expenses.**

A. Motion for Approval. Any person or agency wishing to pay living expenses for a birth parent, as provided by law, shall file a motion with the court, pursuant to Rule 74. The motion shall be accompanied by an affidavit signed by the birth parent justifying the expenses. Unless waived by the court upon a showing of good cause, the court shall set a hearing and shall notify the parties of the location, date and time of the hearing. The court may waive the appearance of the person or agency wishing to pay living expenses.

B. Procedure. The birth parent shall appear at the hearing. The court shall verify the identity of the birth parent before entering any orders.

C. Findings and Order. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. The court shall determine whether the expenses are permissible, as provided by law, and shall grant or deny the motion.

#### **RULE 81. Consent to Adopt.**

A. Motion to Set Hearing. Any person required to sign a consent to adopt before the court shall motion the court, orally or in writing as provided in Rule 74, to set a hearing for the purpose of taking the consent. The court shall set a hearing and shall notify the person seeking to give consent of the location, date and time of the hearing.

B. Procedure. At the hearing, the person seeking to give consent is responsible for the following:

1. Providing the court with proof of identification which shall include a photograph of the person so that the court can verify the identity of the person before taking a consent to adopt;

2. Making arrangements for the presence of a court reporter at the hearing if one is required to effectuate an out of state adoption; and
3. Providing the court with copies of the consents for signature if required, which shall include an additional copy for the court. All copies for signature shall be accompanied by self-addressed, stamped envelopes if the person consenting will request that the court mail the consents to the state where the adoption will occur.

**C. Consent to Adopt an Indian Child. If the child is an Indian child, in addition to requirements as provided by law, the consent to adopt shall contain the following information:**

- 1. The name and birth date of the Indian child;**
- 2. The name of the Indian child's tribe;**
- 3. The identifying number or other indication of the Indian child's membership in the tribe;**
- 4. The name and address of the consenting parent or Indian custodian; and**
- 5. The name and address of the person, division or agency through whom any preadoptive or adoptive placement has been or is to be made.**

**D. Findings and Orders.** At the conclusion of the hearing the court shall, by order or minute entry, state that consents were signed by the person appearing before the court. **In the case of an Indian child, the consents shall be accompanied by the presiding judge's certificate that the terms and conditions were fully explained in detail, in English or interpreted in a language the parent or Indian custodian could understand, and were understood by the parent or Indian custodian.** The signed consents shall be returned to the person consenting to the adoption.

**E. Invalid Consent.** A consent given less than seventy-two (72) hours after the birth of the child is invalid. **In the case of an Indian child, any consent given prior to, or within ten (10) days after the birth of an Indian child is invalid.**

#### **COMMITTEE COMMENT.**

This rule governs procedures relating to the signing of consents by a birth parent as part of an out-of-state adoption where the consents are required to be given in open court or consents involving an Indian child.

## **RULE 82. Petition and Hearing to Revoke Consent.**

- A. **Petition to Revoke Consent.** A person seeking to revoke their consent to the adoption of a child shall file a petition to revoke consent and a notice of hearing with the clerk of the court. The petition shall set forth the basis for the relief sought.
- B. **Notice of Hearing.** A notice of hearing shall accompany the petition and shall advise the parties as to the date, time and location of the hearing.
- C. **Service.** The petition and a notice of hearing shall be served by the petitioner, pursuant to Rule 76, on the person, division, or agency to whom the consent was originally given. Service upon the prospective adoptive parent is not required if the original consent was given to the division or an agency.
- D. **Appointment of Counsel.** Upon receipt of a petition to revoke consent, the court shall appoint counsel for the birth parent seeking to revoke consent if the court determines that person is indigent in accordance with Rule 69.
- E. **Appointment of Guardian ad Litem.** Upon the request of a party or the court's own motion, the court may appoint a guardian ad litem to represent the child. The court may order the guardian ad litem or the division to conduct an investigation for the purpose of determining whether a dependency petition should be filed in the event consents to adopt are revoked. If appropriate, the guardian ad litem shall prepare the dependency petition for filing.
- F. **Initial Hearing.** The court shall set an initial hearing within twenty (20) days of the filing of the petition to revoke. At the hearing the court shall determine whether service has been completed, shall set an evidentiary hearing within forty-five (45) days of the initial hearing and shall order that the parties exchange information as provided in Rule 73(B) no later than thirty (30) days prior to the evidentiary hearing, unless otherwise ordered by the court.
- G. **Burden of Proof.** The burden is upon the person seeking to revoke consent to prove by clear and convincing evidence that the consent to adopt previously given is invalid as provided by law.
- H. **Procedure.** The court shall consider evidence, in the form of testimony and/or documents which have been entered into evidence.
- I. **Findings and Orders.** The findings of the court shall be in writing in the form of a minute entry or order. The court shall advise the parties of their right to appeal and shall enter orders concerning the custody of the child if consents are revoked.

**J. Revocation of Consent by Parent or Indian Custodian.** A parent or Indian custodian seeking to revoke consent may do so at any time prior to the entry of the final order of termination or adoption, as the case may be, by filing a sworn statement of intent to revoke consent with the clerk of the court where the consent was originally executed. The Indian child shall then be returned to the custody of the parent or Indian custodian.

**COMMITTEE COMMENT.**

It was the opinion of the Committee that proceedings to revoke a consent to adopt be more formal than other types of juvenile proceedings due to the potential impact on all parties, particularly the child. The court is urged to consider the appointment of a guardian ad litem for the child, if it appears that valid grounds exist upon which to revoke the consent, in order to assist the court in determining whether the child is dependent.

**RULE 83. Documentation Required to Adopt**

A. Within ten (10) days prior to the finalization of an adoption, the petitioner shall provide to the court the following documents, if applicable:

1. A certified copy of the birth certificate of the child to be adopted;
2. All original consents as provided by law;
3. A notarized affidavit signed by the birth mother identifying all potential fathers of the child as provided by law;
4. An affidavit that a search of paternity filings was conducted;
5. A certificate from the department of health services signed by the state registrar of vital statistics stating that a diligent search has been made of the registry of notices of claims of paternity from potential fathers and the results of the search;
6. Affidavit of service of process upon all potential fathers as provided by law;
7. An affidavit of compliance from an attorney or agency as provided by law;
8. A verified accounting, unless the prospective adoptive parent is the child's step-parent;

9. Notarized statements from any birth parent granting or denying permission for the child being adopted to obtain identifying information about the child and the consenting parent upon the child reaching twenty-one (21) years of age and granting or denying permission to be informed of the death of the child, as provided by law;
10. The original agreement entered into by the birth parent and prospective adoptive parent regarding future communications among the parties, as provided by law; and
11. The social study, as required by law or ordered by the court.

B. The following documents may be provided to the court at the time of the hearing:

1. The certificate of adoption; and
2. The order of adoption.

#### **RULE 84. Hearing to Finalize Adoption.**

A. Attendance. The prospective adoptive parent, the spouse of the prospective adoptive parent and the child to be adopted shall attend the hearing. Upon a showing of good cause, the court may permit testimony in the form of an oral deposition, conducted prior to the hearing in open court, from an adoptive parent unable to attend the final adoption hearing as required by law.

B. Burden of Proof. The burden is on the petitioner to prove by a preponderance of the evidence that the petitioner is a fit and proper person to adopt and that it is in the best interests of the child to be adopted.

C. Procedure. At the hearing the court shall:

1. Receive testimony from the parties verifying the information set forth in the petition to adopt;
2. Determine whether the child consents to the adoption if the child is twelve (12) years of age or older;
3. Review any post-placement agreements reached between the parties and approve such agreements, as deemed appropriate;
4. Set additional hearings as deemed appropriate if the court cannot proceed with the adoption hearing for whatever reason; and

5. Terminate the parental rights of the birth parent, by a finding of clear and convincing evidence, if not terminated previously.
6. If an Indian child subject to the Act is being adopted, the court shall determine whether:
  - a. The tribe was notified of the proceedings and the right to intervene, if applicable;
  - b. The parent or Indian custodian's consent to the adoption was taken in accordance with the Indian Child Welfare Act;
  - c. **The placement complies with the preferences set forth in the Act or whether good cause exists for deviation from the placement preferences; and**
  - d. The parental rights of the parent or Indian custodian have been terminated. **The court shall enter an order terminating parental rights, based upon evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful. This finding shall be in addition to findings made, by clear and convincing evidence, that the petitioner has met the burden of proving grounds upon which to terminate parental rights.**

D. Findings and Orders. The court shall make its findings in writing, in the form of a minute entry or order and shall grant or deny the petition to adopt at the conclusion of the hearing. The court may take the matter under advisement if information required by law had not been received by the court prior to or at the hearing, as required by these rules. If the Indian Child Welfare Act applies, the court shall make findings and enter orders pursuant to the standards and burdens of proof as required by the Act.

1. Wards of the Court. If the child is a ward of the court in the county where the adoption is granted, the court shall dismiss the dependency action. If the child is a ward of the court in another county or state, the court shall direct that the division or agency having had legal custody of the child file a motion to dismiss in the county where the child is a ward.

## **COMMITTEE COMMENT.**

This rule permits the court to accept an oral deposition from a prospective adoptive parent in lieu of personally appearing before the court. This procedure has been informally used in circumstances where the adoptive parent has filed a petition to adopt but subsequently moved out of state prior to the scheduled hearing and could not appear before the court.

Pursuant to 25 U.S.C. 1951, if the child being adopted is subject to the Act, the court must provide the Secretary of the Interior with a copy of the final adoption decree and the following:

1. the name and tribal affiliation of the child;
2. the names and addresses of the biological parents;
3. the names and addresses of the adoptive parents; and
4. the identity of any agency having files or information relating to such adoptive placement.

### **RULE 85. Motion and Hearing to Set Aside Adoption.**

A. Motion to Set Aside Adoption. A person seeking to set aside a final order of adoption shall file a motion to set aside the adoption with the clerk of the court. The motion shall allege grounds only as permitted by Rule 60 (c), Ariz. R. Civ. P. or by the Indian Child Welfare Act. Upon receipt of the motion, the court shall set an initial hearing within ten (10) days and shall advise the parties as to the date, time and location of the initial hearing. If the child is an Indian child, the court shall proceed in the manner set forth in the Indian Child Welfare Act.

B. Appointment of Guardian ad Litem. Upon the request of a party or the court's own motion, the court may appoint a guardian ad litem to represent the child. The court may order the guardian ad litem or the division to conduct an investigation for the purpose of determining whether a dependency petition should be filed in the event the adoption is set aside. If appropriate, the guardian ad litem shall prepare the dependency petition for filing.

C. Initial Hearing. The court shall set an initial hearing within ten (10) days of the filing of the motion to set aside. At the hearing the court shall set an evidentiary hearing within forty-five (45) days of the initial hearing and shall order that the parties exchange information as provided in Rule 73(B), no later than thirty (30) days prior to the evidentiary hearing:

D. Burden of Proof. The burden is upon the person seeking to set aside the adoption to prove the allegations contained in the motion by clear and convincing evidence.

E. Procedure. The court shall consider evidence, in the form of testimony and/or documents which have been entered into evidence.

**F. Indian Child.** After the finalization of an adoption, the parent of an Indian child may withdraw consent to the adoption and petition the court to vacate the adoption decree on the grounds that the consent was obtained through fraud or duress. Upon a finding by the court that consent was obtained through fraud or duress, the court shall vacate the decree and return the Indian child to the parent. No adoption which has been effective for two or more years may be invalidated unless otherwise permitted under State law.

G. Findings and Orders. The court shall make its findings in writing, in the form of a minute entry or order. The court shall advise the parties of their right to appeal and shall enter orders concerning the custody of the child if the adoption is set aside. If the Indian Child Welfare Act applies, the court shall make findings and enter orders pursuant to the standards and burdens of proof as required by the Act.

#### **COMMITTEE COMMENT.**

It was the opinion of the Committee that proceedings to set aside an adoption be more formal than other types of juvenile proceedings due to the potential impact on all parties, particularly the child. The court is urged to consider the appointment of a guardian ad litem for the child to assist the court in determining whether the child is dependent and whether it is in the child's best interest to set the adoption aside.

The Indian Child Welfare Act contemplates the return of the child to the parent or Indian custodian if the adoption is set aside. The court should return the child in the absence of clear and convincing evidence, including testimony of a qualified expert, that return of the child to the parent or Indian custodian would likely result in serious emotional or physical damage to the child.

There is nothing in this rule precluding the parent or Indian custodian from moving to set aside an adoption for reasons other than fraud or duress, pursuant to Rule 60(c), Ariz. R.Civ. P.

#### **RULE 86. Adoption Records.**

A. Request for Records. Unless otherwise provided by law, all requests for information concerning adoption records will be made in writing and filed with the clerk of the court. The request will set forth the information being sought and why the information is needed by the requestor. The court will not release identifying information about the adoptee or birth parent, in the absence of a notarized statement authorizing release, unless the requestor establishes a compelling need for disclosure.

B. Records of Indian Adoption. Upon application by an Indian individual who has reached the age of eighteen (18) and who was the subject of an adoptive placement, the court which entered the final adoption decree shall inform the individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights

flowing from the individual's tribal relationship. If the biological parent executed a notarized statement requesting anonymity, information pertaining to the biological parent shall be redacted prior to release.

**RULE 87. Modification of Post Placement Agreements.**

A. Motion to Modify. After a good faith attempt to mediate any disagreements, any party to a court ordered post-placement agreement may request the court to enforce or modify the agreement by filing a motion with the court pursuant to Rule 74. The motion will set forth what efforts the parties have made to mediate disagreements prior to the filing of the motion. The court will set a hearing and will notify the parties of the location, date and time of hearing.

B. Procedure. All disputing parties to the agreement will appear before the court. The proceedings will be conducted in an informal manner. All documents the parties wish the court to consider will be marked and entered into evidence if admissible.

C. Findings and Orders. The court will make its findings in writing by order or minute entry. At the conclusion of the hearing, the court will determine whether there has been a breach of the post-placement agreement, and whether the original agreement should be enforced or modified.